EDITOR'S NOTE

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tatus: GRANTED

Title: Lowell D. Hewitt, et al., Petitioners
v.
Aaron Helms

ocketed:
pril 3, 1986

Court: United States Court of Appeals
for the Third Circuit

Counsel for petitioner: Warshaw, Allen C.

Counsel for respondent: Humphrey, John M.

ntry	Date	Note	Proceedings and Orders
1	Apr 3 1986	G	Petition for writ of certiorari filed.
2	May 5 1986		Brief of respondents Lowell D. Hewitt, et al. in opposition filed.
3	May 13 1986		DISTRIBUTED. May 29, 1986
4	May 14 1986	X	Reply brief of petitioners Lowell Hewitt, et al. filed.
6	Jun 6 1986		REDISTRIBUTED. June 12, 1986
7	Jun 16 1986		Petition GRANTED.
			**********
9	Jun 30 1986		Order extending time to file brief of petitioner on the merits until August 30, 1986.
10	Aug 7 1986		Record filed.
11	Aug 25 1986		Record filed.
12	Aug 29 1986		Brief amicus curiae of Natl. Governors' Assn, et al. filed.
13	Sep 3 1986		Joint appendix filed.
14	Sep 3 1986		Brief of petitioners Lowell Hewitt, et al. filed.
15	Aug 29 1986		Brief amicus curiae of United States filed.
16	Sep 5 1986	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
17	Oct 6 1986		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Scalia OUT.
18	Oct 1 1986		Brief of respondents Lowell D. Hewitt, et al. filed.
19	Oct 22 1986		CIRCULATED.
21	Dec 19 1986		SET FOR ARGUMENT. Wednesday, March 4, 1987. (3rd case).
22	Feb 5 1987		Record filed.
23	Feb 5 1987		Certified copy of briefs received.
24	Feb 17 1987	X	Reply brief of petitioners Lowell Hewitt, et al. filed.
25	Mar 4 1987		ARGUED.

85-1830

Supreme Court, U.S.
FILED
APR 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

LOWELL D. HEWITT, Supt.;
B. B. KYLER, CO III;
R. E. STOTELMYER, Major;
B. K. Smith, Counselor III;
K. R. Hileman, Farm Manager;
D. R. Erhard, Deputy Supt. for Treatment;
T. W. HENRY, Director of Treatment;
W. W. MATEER, C. I., Manager
Petitioners

v.

AARON HELMS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

LeROY S. ZIMMERMAN
Attorney General

ALLEN C. WARSHAW
Executive Deputy Attorney General
Director, Commonwealth Agencies Legal Services Division

ANDREW S. GORDON
Chief Deputy Attorney General
Chief, Litigation Section

FRANCIS R. FILIPI
Senior Deputy Attorney General
Counsel of Record

JOHN G. KNORR III
Senior Deputy Attorney General

Attorneys for Petitioners

Office of Attorney General
15th Floor Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

QUESTION PRESENTED

Whether respondent was a prevailing party, entitling him to an award of attorney's fees pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, even though his release from prison rendered moot his prayers for declaratory and injunctive relief and petitioners were found to be immune from any award of damages.

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IN THE SUPREME COURT OF THE UNITED STATES

No.

LOWELL D. HEWITT, Supt.;
B. B. KYLER, CO III;
R. E. STOTELMYER, Major;
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K. R. Hileman, Farm Manager;
D. R. Erhard, Deputy Supt.
for Treatment;
T. W. HENRY, Director
of Treatment;
W. W. MATEER, C. I., Manager

Petitioners

v.

AARON HELMS,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

The petitioners, Lowell D. Hewitt, B.B. Kyler, R.E. Stotelmyer, B.K. Smith, K.R. Hileman, D.R. Erhard,

T.W. Henry, and W.W. Mateer, hereby petition that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Third Circuit entered in this case on January 3, 1986.

OPINIONS BELOW

The opinion of the court of appeals of January 3, 1986 (Pet. App. 3a-25a) [1] is reported at 780 F.2d 367. The opinion of the district court of March 14, 1984 (Pet. App. 26a-39a) is not reported.

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[1] "Pet. App." refers to the appendix to this petition.

JURISDICTION

The opinion of the Court of Appeals for the Third Circuit was issued on January 3, 1986. This petition for a writ of certiorari was filed within ninety days of that date. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 2 of The Civil Rights Attorney's Fees Awards Act of 1976, Pub.L. 94-559, October 19, 1976, 90 Stat. 2641, as amended provides:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and Title "CIVIL RIGHTS," and of Title "CRIMES", for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the

> State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988.

STATEMENT OF THE CASE

This is a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in which the court held that respondent was a "prevailing party" within the meaning of Section 2 of The Civil Rights Attorney's Fees Awards Act of 1976, Pub.L.94-559, October 19, 1976, 90 Stat. 2641, 42 U.S.C. § 1988, as amended (hereinafter, Section 1988). The district court had concluded that Helms had not prevailed because he had not received any of the relief he had sought. Pet. App. 36a-38a. The court of appeals reversed. Pet. App. 1a-2a.

This action began in the United States District Court for the Middle District of Pennsylvania on July 26, 1979. Helms filed it pursuant to 42

U.S.C. § 1983 on his own behalf and his behalf alone. At that time, Helms was in state prison; the defendants, petitioners in this Court, are state prison officials.

In this action, Helms challenged his detention in administrative custody pending completion of an investigation, his prison misconduct conviction, and his consequent confinement to restricted custody. He sought a declaratory judgment, an injunction to enjoin the prison officials from continuing him in restricted custody and to reverse and expunge his misconduct convictions, damages, costs, attorney's fees and "[s]uch other relief as may be necessary and proper."

On February 20, 1980, Helms was released from prison. On August 15, 1980, the district court, considering cross motions for summary judgment, entered judgment against Helms and in favor of the prison officials. The district court held that Helms' confinement in administrative custody implicated no interest protected by the Fourteenth Amendment (administrative custody issue); and that the institutional hearing committee's reliance on information obtained from a confidential informant to convict Helms of a prison misconduct was proper (informant's testimony issue).

The court of appeals reversed the judgment of the district court on both claims. Helms v. Hewitt, 655 F.2d 487 (3d Cir. 1981). The prison officials filed a petition for writ of

certiorari seeking review on the administrative custody issue only. The petition was granted. Hewitt v. Helms, 455 U.S. 999 (1982).

This Court agreed with the court of appeals' holding that the Pennsylvania regulations governing a prisoner's transfer to administrative custody created a protected liberty interest, but reversed the court of appeals' judgment on the ground that Helms had received all the process that was due to protect that interest. Hewitt v. Helms, 459 U.S. 460 (1983). On remand, the court of appeals vacated its previous judgment on the administrative custody issue and directed the district court to conduct further proceedings consistent with their original opinion on the informant's testimony issue. Helms v. Hewitt,

712 F.2d 48 (3d Cir. 1983).[2]

On remand to the district court, the parties filed cross motions for summary judgment. The only issue presented in the cross motions was whether the prison officials were entitled to immunity from damages. Helms did not request either declaratory or injunctive relief. The district court again entered judgment in favor of the prison officials and against Helms. Helms again appealed claiming that the district court had erred in determining

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[2]The original direction to the district court was: "Thus, on remand, if the defendants do not establish official immunity as discussed in Part IV infra, the district court should enter summary judgment for Helms on the issue whether he was denied due process in being confined in disciplinary custody." Helms, 655 F.2d at 502-503.

that the prison officials were entitled to immunity, and in failing to order the prison officials to expunge the misconduct charges based on the information supplied by a confidential informant. The court of appeals affirmed the district court's judgment without opinion. Helms v. Hewitt, 745 F.2d 46 (3d Cir. 1984) (mem.) [3]

In the meantime, after the district court had entered judgment but before that judgment was affirmed an appeal, the Pennsylvania Bureau of

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[3]In all appeals to the court of appeals the prison officials argued that the injunctive and declaratory relief requested in the complaint had been rendered moot by Helms' release from prison.

Corrections issued an amended regulation known as "Administrative Directive 801: Inmate Disciplinary Procedures." Effective May 1, 1984, the amended Administrative Directive 801 established, for the first time, procedures for the use of confidential source--i.e., informant--information in prison disciplinary proceedings. Pet. App. 10a.

Some months after the court of appeals had affirmed the district court, Helms filed an application for attorney's fees. Pet. App. 11a. As noted above, the district court denied the application. The district court found that Helms had lost his claim for damages, that his claim for injunctive relief had been mooted by his release

from prison, and that he had neither sought nor benefited from the change in procedure embodied in Administrative Directive 801. Pet. App. 34a-38a.

The court of appeals reversed, on the ground that its earlier holding--that Helms' due process rights were violated by the use of information supplied by a confidential informant as the sole basis of his conviction of a misconduct charge --was a form of "judicial relief" sufficient to make Helms a prevailing party. Pet. App. 17a-19a. Further, the court held that if Helms could prove that the amendment to Administrative Directive 801 had been caused by his litigation, he was entitled to be considered the prevailing party on this ground as well. Pet. App. 23a.

REASONS FOR GRANTING THE WRIT

I. WHETHER A PLAINTIFF WHO OBTAINS NO PERSONAL BENEFIT IS A PREVAILING PARTY FOR PURPOSES OF SECTION 1988 IS AN ISSUE OF GREAT IMPORTANCE WHICH HAS NOT BEEN RESOLVED BY THIS COURT.

Section 1988 provides in relevant part: "In any action or proceeding to enforce a provision of section[ ] 1983...of this title, [4]...the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." In the instant case, the court of appeals found that a "declaration" Pet. App. 18a made in the course of an earlier appeal constituted "a form of judicial relief" sufficient to make Helms a "prevailing party" within the meaning of § 1988. Pet. App.

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[4]Title 42, United States Code.

18a-19a. Further, the court held that if on remand Helms could prove this action was the catalyst for a revision in the prison regulation he could assert prevailing party status on this basis as well, even though he received no benefit from that change. Pet. App. 23a. [5]

The issue thus presented is whether a plaintiff can be a prevailing party when he fails to obtain any personal benefit from his litigation. While the Act has been the subject of a

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[5]The court below explained that even though it had resolved the question of Helms' prevailing party status in his favor on grounds he had obtained judicial relief, the catalyst inquiry was necessary to address the extent of his success in accordance with Hensley v. Eckerhart, 461 U.S. 424 (1983). Pet. App. 20a

number of opinions of this Court, and even more frequent reviews by the lower federal courts, this issue has not been the subject of definitive opinion of this Court.[6]

In Hanrahan v. Hampton, 446 U.S. 754, 757 (1980), the Court held that Section 1988 "permit[s] such an . . . award only to a party who has established his entitlement to some relief on the merits of his claims, either in the trial court or on appeal." In Hensley v. Eckerhart, 461 U.S. 424, 433 (1983), (quoting from Nadeau v. Helgemoe, 581 F.2d 275, 278-79

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[6]For example, in Kentucky v. Graham, No. 84-849, (June 28, 1985) slip op. at 5 n.9 the Court observed: "We express no view as to the nature or degree of success necessary to make a plaintiff a prevailing party. See Maher v. Gagne, 448 U.S. 122 (1980)."

(1st Cir. 1978)), the Court found that an appropriate "typical formulation is that 'plaintiffs may be considered "prevailing parties" for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." Therefore, while the term "prevailing party" has been defined as requiring a showing by plaintiff of "his entitlement to some relief" and achievement of "some of the benefits the parties sought," the question whether the relief obtained or the benefits sought actually inure to plaintiff has not been adequately resolved.

Left undisturbed, the holding by the court below promotes pursuit of issues in which the parties have lost

their concrete adversarial relationship. The opinion of the court of appeals appears to treat differently applications for attorney's fees depending on whether defendant's immunity defense is considered by the district court before the first appeal rather than after remand.[7] If the district court had considered the prison officials' assertion that they were entitled to immunity and had granted judgment on the damages claim on this ground as well, there can be no doubt that Helms was not a prevailing party. To consider Helms to have prevailed merely because he succeeded in obtaining

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[7]Helms' declaratory and injunctive prayer were moot before the district court's first opinion granting the prison official's summary judgment.

a remand which only resulted in the same conclusion is anomalous. As observed by this Court, "...Congress sought to avoid making § 1988 a '"relief fund for lawyers."' Kentucky v. Graham No 84-849 (June 28, 1985) slip op. at 8-9 (citations omitted).

The court of appeals would also permit Helms to qualify for fees regardless of when the prison officials changed the regulation so long as he could show that his litigation somehow affected that change. In the instant case, the prison regulations were modified to provide a process for assessing the credibility and reliability of informant's testimony while the action was pending in the court of appeals on an appeal from the grant of judgment in favor of the prison officials based on their immunity. That modification had no

possible impact on either Helms or his lawsuit since he was no longer in prison.[8] The catalyst analysis should not be broadened to permit a plaintiff to succeed for attorney's fees when the change in regulations did not moot the injunctive prayer since it was already moot and when he obtains no personal benefit.

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[8]Helms appealed the district court's award of judgment in favor of the prison officials, inter alia, on the ground that the district court should have enjoined the prison oficials to expunge Helms' dormant prison records. The prison officials argued both that Helms had abandoned his prayer for injunctive relief by failure to pursue it in his summary judgment motion and that, in any case, all injunctive prayers had been rendered moot. The court of appeals affirmed the district court's judgment without opinion. Helms v. Hewitt, 745 F.2d 46 (3d Cir. 1984) (mem.)

It is unthinkable that attorney's fees applications can achieve viability independent of the original cause of action. The opinion of the court below would permit, in effect, a separate action for fees based on conduct of former litigants taken long after the original litigation had ended. The spectre of fee awards in such cases in which no injunction was issued may have the effect of impeding the implementation of changes in government policies rather than promoting them. "[L]iability on the merits and responsibility for fees go hand in hand; where a defendant has not been prevailed against, either because of legal immunity or on the merits, § 1988 does not authorize a fee award against that defendant." Kentucky v. Graham, No 84-

849, (June 28, 1985) Slip Op. at 5 (citation and footnote omitted). While Graham examines the question of awarding attorney's fees from the opposite direction--i.e., who has been prevailed against rather than who succeeded in prevailing--it is instructive on the inexorable link which must exist between the success on the merits and the success on an application for fees. The Court should accept review of this case because the decision of the Court of appeals effectively negates the requirement that the plaintiff must obtain some relief to be entitled to fees.

II. THE DECISION OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT IS IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF 42 U.S.C. § 1988

As noted above, the full contours of the term "prevailing party", left undefined by the Act, have not been fixed. The court of appeals found that its prior statement on the law, which the prison officials submit could not confer actual benefit on Helms as he was no longer in prison and did not result in an award of damages, constituted judicial relief and permitted Helms to prevail for fees. The court of appeals also found that Helms could attain prevailing party status for fees if he could prove his litigation was the catalyst for the modification in prison regulations which occurred after his release from prison. As we discuss

below, there is a conflict among the circuits on how and when a plaintiff may be considered prevailing. This issue should be resolved by this Court.

a. The Decision Below That A Statement On The Law Contained In The First Opinion Of The Court Of Appeals Constituted Judicial Relief Conferring Prevailing Party Status On A Plaintiff Conflicts With Decisions Of Other Courts Of Appeals.

After observing that the prison officials had argued that Helms had obtained no damages because they enjoyed qualified immunity and that Helms' release from prison had rendered moot his prayers for declaratory and injunctive relief, the court of appeals stated:

We reject the [prison officials'] contention that [Helms] failed to obtain judicial relief. In Helms I [Helms v. Hewitt, 655 F.2d 487 (3d Cir. 1981)] we declared that [Helms'] due process rights were violated by the prison officials' unconstitutional use the hearsay report....Our declaration acts as an important vindication of [Helms] rights. Accord Fast v. School District of City of Ladue, 728 F.2d 1030, 1033 (8th Cir. 1984) (en banc). The declaration is a form of judicial relief which serves to affirm [Helms'] assertion that the [prison officials'] actions were unconstitutional and which will serve as a standard of conduct to guide prison officials in the future. We find that, on the facts before us, [Helms] did actually obtain judicial relief of the same general type as that requested....Section 1988 does not require that [Helms] secure for-

> mal relief or monetary damages to be considered a prevailing party.

(App. 17a-19a) (citations omitted).[9] It is apparent that the court below did not address the prison officials' contention that equitable relief had been rendered moot and, therefore, a declaration in the formal judicial sense

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[9]In point of fact, the court's reliance upon Fast is misplaced. In Fast, the district court awarded plaintiff, a tenured teacher, an injunction requiring defendants to provide the teacher with a post- termination hearing. The teacher elected to waive her right to a hearing and moved for an award of nominal damages and attorney's fees. The fact that she elected not to go through with the hearing is of no moment, because none of the relief for which she prayed became moot during the course of the proceeding. There can be no doubt that she obtained a personal benefit.

was unavailable. It can only be assumed that the court below concluded that a resolution of the mootness issue was not material to determining Helms' right to fees. To the contrary, the fact Helms could not obtain a declaratory judgment is material and failure to address this fact conflicts with opinions of other courts of appeals.

In Tucker v. Summer, C.A. No. 85-3355 (5th Cir. March 10, 1986) the court rejected a claim for fees based on plaintiff attaining a preliminary injunction that required defendants to permit plaintiff to sit for the state bar exam. In considering an appeal injunction from a denial of attorney's fees the court of appeals concluded it had lacked subject matter jurisdiction

to enter the from the outset. In order to grant plaintiff a preliminary injunction in the first instance the court had to have concluded that her probability of success on the merits was high. The fact this was not discussed in denying fees leads to the conclusion that the Fifth Circuit believed that whatever conclusion it reached concerning constitutional law was not material to resolving plaintiff's claim for fees when plaintiff was ultimately unsuccessful in obtaining the relief she sought.

Similarly, in Ward v. County of San Diego, C.A. No. 84-6362 (9th Cir., March 3, 1986), the Ninth Circuit expressly rejected plaintiff's contention that a preliminary injunction entered by the district court, but vacated by the court of appeals because

plaintiff lacked standing, conferred prevailing status on her because it contained a statement of constitutional violation.

There should be no doubt that the court below in Helms lacked jurisdiction to enter a judgment in favor of Helms. As is noted in the Statement above, Helms had been released from prison before the first opinion by the court of appeals [10] The existence of an "'actual controversy' [is] a requirement imposed by Article III of the Constitution and the express terms

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[10]Helms was released on February 20, 1980; the court of appeals entered its order reversing the district court on June 30, 1981. Helms v. Hewitt, 655 F.2d 487 (3d Cir. 1981).

of the Federal Declaratory Judgment Act, 28 U.S.C. § 2201." Steffel v. Thompson, 415 U.S. 452, 458 (1974) (footnote omitted). See Bender v. Williamsport Area School District, No. 84-773 (March 25, 1986). There must be extant at all times prior to final judicial review "a substantial controversy between the parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941). Even assuming Helms had standing to seek a declaratory judgment prior to his release, his parole from prison rendered moot his declaratory prayer. Allen v. Likins, 517 F.2d 532 (8th Cir. 1975).

Therefore whatever the import of the court of appeals' statement, it did not constitute a valid declaratory judgment.

In Harrington v. Vandalia - Butler Bd. of Ed., 585 F.2d 192, 197 (6th Cir. 1978), cert. denied, 441 U.S. 932 (1979), a case considering an application for attorney's fees under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) [12] The court noted:

> It is true, of course, that the plaintiff succeeded in obtaining a judicial determination that the defendant Board discriminated against her in the conditions of her employment. This determina-

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[12] Although the Title VII attorney's fees provision and § 1988 are separate and distinct statutory bases for awards of attorney's fees, both employ the "prevailing party" concept and they have received similar construction. Hensley v. Eckerhart, 461 U.S. 424, 433 n 7. (1983); Hughes v. Rowe, 449 U.S. 5, 14 (1980).

> tion, standing alone, does not in our judgment suffice to constitute her as a prevailing party within the meaning fo the Act."

Because the court of appeals lacked jurisdiction to enter a declaratory judgment, its declaration of law in the process of considering a claim for damages which the plaintiff lost conferred no benefit on Helms. Thus, its opinion on prevailing party status is in conflict with the Court of Appeals for the Fifth, Sixth and Ninth Circuits.

b. The Finding That A Plaintiff Is The Prevailing Party If The Change In Prison Regulations Was Caused By His Litigation, Even Though He Will Not Personally Benefit From The Change, Is In Conflict With The Opinions Of Other Courts Of Appeals.

The district court did not conduct a hearing to determine if Helms was the catalyst for an addition to prison regulations which occurred more than four years after Helms' release from prison[13] and after the last opinion on the merits by the district determination was made without court.

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[13]Helms was paroled from prison on February 20, 1980. The regulation detailing the procedures to be followed when using confidential source information was effective May 1, 1984. (App. 10a)

The basis for the district court's denial of fees was that Helms had not prevailed in fact. This conducting a hearing because plaintiff could not have benefited by the change in regulation relating to hearings for prisoners when he was no longer a prisoner and because, in any case, he had not sought that relief. The court of appeals ignored the fact that Helms could not have received the benefit of any change, stating "[s]ection 1988 is designed to provide an incentive to the ordinary citizen to enforce the Constitution whenever it is violated so that the rights of all similarly-situated persons will be better protected". Pet. App. 22a In conclusion, it observed that "[i]f [Helms] can establish causation between his suit and 'some of the benefit sought,' he is a prevailing

party on this issue for purposes of section 1988. We find sufficient evidence of causation to warrant a hearing before the district court." Pet. App. 23a. (citation omitted). This holding, which necessarily implies that whether Helms benefits from the change is immaterial to deciding prevailing party status, is in conflict in principle with other courts of appeals.

In each opinion from another court of appeals in which the catalyst analysis has been employed, the fact that the plaintiff was a recipient of the benefit is clear. For example, in Dover v. Rose, 709 F.2d 436, 439 (6th Cir, 1983) the court stated: "In order to be a prevailing party for purposes of section 1988, a plaintiff must establish his entitlement to some form of relief

on the merits of a substantial claim." (citations omitted) (emphasis supplied). In Doe v. Busbee, 684 F.2d 1375, 1379 (11th Cir. 1982), the court observed: "[a] party may be considered to be 'prevailing' if the litigation successfully terminates by consent decree, an out-of-court settlement, a voluntary cessation of the unlawful practice by defendant, or other mooting of the case where the plaintiff has vindicated his right." (emphasis added). In Othen v. Ann Arbor School Bd., 699 F.2d 309, 313 (6th Cir. 1983), the court stated: "[w]e do not believe the plaintiff [a father who brought the action as next friend of his two daughters] can be considered the prevailing party' in this action. He asked for no specific relief for his daughter . . . . [h]e withdrew his request for

all relief on the basis of assurances that there would be a golf team...which his younger daughter would have the opportunity to try out for."

The application of the catalyst analysis in the instant case conflicts with these other cases in two respects. First, the change in regulation did not moot that aspect of the action as it was already moot. Second, Helms has been permitted to prevail for fees without a change in the prison officials' regulation having benefited him.

CONCLUSION

The petition for a writ of certiorari should be granted and upon review the judgment of the Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

LeROY S. ZIMMERMAN
Attorney General

ALLEN C. WARSHAW
Executive Deputy
Attorney General
Director,
Commonwealth
Agencies Legal
Services Division

ANDREW S. GORDON
Chief Deputy
Attorney General
Chief, Litigation
Section

FRANCIS R. FILIPI
Senior Deputy
Attorney General
Counsel of Record

JOHN G. KNORR III
Senior Deputy
Attorney General

Office of Attorney General
15th Floor
Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 85-5254
AARON HELMS, Appellant
vs.
LOWELL D. HEWITT, Supt.;
B. B. KYLER, CO III;
R. E. STOTELMYER, Major;
B. K. Smith, Counselor III;
K. R. Hileman, Farm Manager;
D. R. Erhard, Deputy Supt.
for Treatment;
T. W. HENRY, Director
of Treatment;
W. W. MATEER, C. I., Manager
(D. C. Civil No. 79-0950)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA

Present: HIGGINBOTHAM, SLOVITER and
MANSMANN, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel November 18, 1985.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said

District Court, entered March 14, 1985 be, and the same is hereby reversed and the cause remanded to the said District Court with direction to conduct a hearing on plaintiff's catalyst argument and for calculation of the fee award. Costs taxed against the appellees. All of the above in accordance with the opinion of this Court.

ATTEST:

s/Sally Mrvos

Clerk

January 3, 1986

Certified as a true copy and issued in lieu of a formal mandate on January 27, 1986.

Test: s/M. Elizabeth Ferguson Chief Deputy Clerk, United States Court of Appeals for the Third Circuit.
UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 85-5254

AARON HELMS

vs.

LOWELL D. HEWITT, Supt.;
B.B. Kyler, CO III;
R.E. STOTELMYER, Major;
B.K. SMITH, Counselor III;
K.R. HILEMAN, Farm Manager;
D.R. ERHARD, Deputy Supt.
for Treatment;
T.W. HENRY, Director of Treatment;
W.W. MATEER, C.I., Manager

Aaron Helms,

Appellant

Appeal from the United States
District Court for the Middle District
of Pennsylvania

(D.C. No. 79-0950)

Argued November 18, 1985

Before: HIGGINBOTHAM, SLOVITER and
MANSMANN, Circuit Judges

(Filed January 3, 1986)

Robert H. Vesely, Esq. (Argued)
John M. Humphrey, Esq.
RIEDERS, TRAVIS, MUSSINA,
HUMPHREY & HARRIS
161 West Third Street
P.O. Box 215
Williamsport, PA 17701

ATTORNEYS FOR APPELLANT

Francis R. Filipi, Esq. (Argued)
OFFICE OF ATTORNEY GENERAL
15th Floor,
Strawberry Square
Harrisburg, PA 17120

ATTORNEY FOR APPELLEE

OPINION OF THE COURT

MANSMANN, Circuit Judge.

This appeal arises from the district court's denial of plaintiff's petition for attorney's fees filed pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, as amended, 42 U.S.C. § 1988 (1981), after the entry of summary judgment in favor of the defendants. The underlying action involved the plaintiff's claim that his Four-

teenth Amendment due process rights were violated by the defendants' actions when he was confined to administrative segregation. The district court denied the plaintiff's fee application because it found that the plaintiff was not a prevailing party for purposes of section 1988. We reverse and remand to the district court for a hearing and computation of the amount of a fee award.

I.

The plaintiff filed this action under 42 U.S.C. § 1983 against officials of the State Correctional Institution at Huntingdon, Pennsylvania. In his complaint, the plaintiff protested his confinement in administrative segregation by the defendants after they alleged that he assaulted a prison employee and participated in a riot. The plain-

tiff expounded three theories by which his due process rights as guaranteed by the Fourteenth Amendment were violated by that confinement. Helms v. Hewitt, 655 F.2d 487, 491-92 (3d Cir. 1981) ("Helms I") (subsequent history omitted). First, Helms claimed that Pennsylvania Bureau of Corrections' regulations governing administrative segregation established the process due under the Fourteenth Amendment and that the failure to accord him that process violated his constitutional rights. Second, the plaintiff asserted that the state's prison regulations created a liberty interest of which he could be deprived only by constitutionally mandated due process. Third, Helms argued that a finding of guilt resting on a hearsay account of uncorroborated information from a single unidentified

informant contravenes principles of fundamental fairness implicit in the Due Process Clause.

The plaintiff requested the entry of declaratory judgment, "declaring plaintiff's rights under the Fourteenth Amendment and 42 U.S.C. § 1983 violated as more specifically set forth in this Complaint." The plaintiff also prayed for the entry of a permanent injunction, a reversal of his disciplinary conviction, monetary relief and "such other relief as may be necessary and proper."

After discovery was closed, the district court granted the defendants' motions for summary judgment. The plaintiff appealed that decision, and we reversed. Helms I, 655 F.2d 487 (3d Cir. 1981). We found that the state regulations had created an expectancy or

entitlement which rose to the level of a protected liberty interest. We held that "Helms was denied due process unless he was afforded a hearing, within a reasonable time of his initial confinement, to determine whether he represented the type of 'risk' warranting administrative detention." Id. at 500. We also concluded that "Helms suffered a denial of due process by being convicted on a misconduct charge when the only evidence offered against him was an uncorroborated report of an unidentified informant." Id. at 502. The case was remanded to the district court to determine whether Helms had been afforded a hearing satisfying the requirements of due process and to decide whether the defendants were entitled to qualified immunity with

respect to the unconstitutional use of the hearsay report.

The United States Supreme Court granted the defendants' petition for writ of certiorari and reversed. Hewitt v. Helms, 459 U.S. 460 (1983). The Supreme Court agreed that the state regulations created a constitutionally protected liberty interest. The Court held, however, that the plaintiff had been afforded sufficient due process after being confined to administrative segregation. The Supreme Court was not asked to review our finding that the defendants' use of the hearsay report violated the Constitution.

Following the Supreme Court's decision, we remanded the case to the district court for resolution of the question of qualified immunity on the

hearsay issue. Helms v. Hewitt, 712 F.2d 48, 49 (3d Cir. 1983) ("Helms II"). The district court subsequently found that the defendants were entitled to qualified immunity and entered judgment against the plaintiff. We affirmed without opinion. Helms v. Hewitt, 745 F.2d 46 (3d Cir. 1984) (aff'ing mem.) ("Helms III").

During the course of this litigation the Bureau of Corrections of the Commonwealth of Pennsylvania issued Administrative Directive 801: Inmate Disciplinary Procedures. This directive, effective May 1, 1984, detailed for the first time the procedures to be followed with respect to the use of confidential source information.

On December 7, 1984, the plaintiff filed the petition for attorney's fees which is the subject of this appeal. The district court denied that petition.

II

The Civil Rights Attorney's Fees Awards Act of 1976 provides that "[i]n any action or proceeding to enforce a provision of [section 1983]. . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988 (1981). Congress enacted section 1988 because it believed that fee awards are essential to the private enforcement of the civil rights laws.

> If private citizens are to be able to assert their civil rights, and if those who violate the

> Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

S.Rep. No. 94-1011, 94th Cong., 2d Sess. 2, reprinted in 1976 U.S. Code Cong. & Ad. News 5908, 5910. "In the civil rights area, Congress has instructed the courts to use the broadest and most effective remedies available to achieve the goals of our civil rights laws." Id. at 3, reprinted in 1976 U.S. Code Cong. & Ad. News at 5910-11.

In decisions interpreting section 1988, we have articulated two requirements for prevailing party status warranting an award of attorney's fees:

> [T]he plaintiffs must essentially succeed in obtaining some relief on the merits of their claim, and the circumstances under which the

> plaintiffs obtain that relief must be causally linked to the prosecution of the complaint.

N.A.A.C.P. v. Wilmington Medical Center, Inc., 689 F.2d 1161, 1171 (3d Cir. 1982) (citations and footnote omitted), cert. denied, 460 U.S. 1052 (1983); see also Institutionalized Juveniles v. Secretary of Public Welfare, 758 F.2d 897, 910-11 (3d Cir. 1985) (reaffirming standard in light of Hensley v. Eckerhart, 461 U.S. 424 (1983)).

The plaintiff argues that he should be afforded prevailing party status because he obtained "some relief" on his claim that the use of the hearsay report of an unidentified informant to support administrative segregation violated due process. The plaintiff claims he obtained relief from the judicial holdings in this litigation

and, in addition, from the promulgation of Administrative Directive 801. The district court found no merit in either alleged source of relief. The court reasoned:

> In this case, while the court found a constitutional violation, the defendants were held to be immune from liability for compensatory damages. Plaintiff's requests for injunctive relief were moot since plaintiff was no longer in prison to receive the benefits of his requested relief. Thus, while the plaintiff may claim a moral victory by the issuance of Administrative Directive 801, he has failed to prove that he was entitled to relief.

The district court, having found that the plaintiff had not succeeded in obtaining some relief on the merits of his claim, rejected the fee petition.

We review that determination for legal error. Universal Minerals, Inc. v. C.A. Hughes & Co., 669 F.2d 98, 102 (3d Cir. 1981).

III.

The plaintiff first challenges the district court's finding that the plaintiff failed to achieve some relief on the merits of his claim in the course of this litigation. The plaintiff asserts that our holding in Helms I, declaring that the plaintiff's rights were violated by the defendants' unconstitutional use of the hearsay report, was the source of some relief on the merits of his claim. Consequently, the plaintiff argues, he is a prevailing party for purposes of section 1988.

The first step in applying the prevailing party standard is "to identify the relief plaintiff sought and, in the relevant cases, the legal theories on which the relief was based." Institutionalized Juveniles, 758 F.2d at 911. The district court should compare the relief sought with the relief actually obtained, not with the success of the legal theories. The entry of judgment in the plaintiff's favor is not essential for prevailing party status. A plaintiff, for example, may be a prevailing party where extra-judicial relief makes the legal claims moot. Id. A plaintiff may also be a prevailing party where he is awarded relief which he previously asserted was inadequate or where the relief obtained

is not identical to the relief specifically demanded, so long as the relief obtained is of the same general type. Id. at 912. In the instant case, the plaintiff sought broad relief. In addition to demands for monetary and injunctive relief, the plaintiff sought a declaratory judgment announcing that the defendants had violated his constitutional rights. The plaintiff also requested "such other relief as may be necessary and proper." We note that the district court is empowered to award the plaintiff all relief to which he is entitled, including relief not demanded in his pleadings. Fed.R.Civ.P.54(c).

Having outlined the relief sought by the plaintiff, we turn to the identification of what judicial relief the plaintiff actually obtained. The defendants argue that the plaintiff obtained no judicial relief. The defen

dants indicate that, as a result of the district court's qualified immunity finding, the plaintiff was not entitled to monetary damages. The defendants also maintain that plaintiff's other requests for relief were rendered moot by his release from prison.

We reject the defendants' contention that plaintiff failed to obtain judicial relief. In Helms I, we declared that plaintiff's due process rights were violated by the prison officials' unconstitutional use of the hearsay report. We held:

> [A] prisoner is denied due process when his conviction on disciplinary charges rests solely on a hearsay report of an unidentified informant's account which offers no basis for an independent assessment of the informant's credibility or reliability.

Helms I, 655 F.2d at 503. Our declaration acts as an important vindication of the plaintiff's rights. Accord Fast v. School District of City of Ladue, 728 F.2d 1030, 1033 (3th Cir. 1984) (en banc). The declaration is a form of judicial relief which serves to affirm the plaintiff's assertion that the defendants' actions were unconstitutional and which will serve as a standard of conduct to guide prison officials in the future.

We find that, on the facts before us, the plaintiff did actually obtain judicial relief of the same general type as that requested in his complaint. The plaintiff successfully served as a "private attorney general" to enforce the Constitution where he suspected a violation of his rights.

Section 1988 does not require that he secure formal relief or monetary damages to be considered a prevailing party. N.A.A.C.P. v. Wilmington Medical Center, Inc., 689 F.2d at 1167. The Congressional purpose in enacting section 1988 is served where a plaintiff who successfully acts as a "private attorney general" is permitted to recover attorney's fees. See S. Rep. No. 94-1011, 94th Cong., 2d Sess. 2, reprinted in 1976 U.S. Code Cong. & Ad. News 5908, 5910.

We find that the district court erred in failing to award attorney's fees for professional services relating to this issue. We will remand to the district court for computation of the amount of the attorney's fees award.

IV.

Second, we consider the plaintiff's contention that he is a prevailing party entitled to an award of attorney's fees because his suit acted as a catalyst for the promulgation of the revisions of Administrative Directive 801. We reach this issue despite our finding of prevailing party status above because one factor in the computation of the amount of the fee award is the extent of relief actually obtained by the prevailing party. Hensley v. Eckerhart, 461 U.S. 424 (1983). The revisions of Administrative Directive 801 addressed the use of hearsay reports based on information from confidential informants in prison disciplinary proceedings. The district court dismissed the plaintiff's catalyst argument, finding that he had

not sought "relief in the form of corrective procedures by the Bureau of Corrections in the use of undisclosed informants." We reject the court's reasoning.

We have said that, for purposes of a section 1988 petition:

> Any success achieved by plaintiff need not be achieved in a formal manner; a plaintiff is considered the prevailing party if his "lawsuit acted as a catalyst which prompted [the defendant] to take action" to correct the unlawful practice.

N.A.A.C.P. v. Wilmington Medical Center, Inc., 689 F.2d at 1167 (citation omitted). We note that the plaintiff specifically requested a change in the defendants' practice so far as it was applied to him. Since we can assume that the state and its agents would act in good faith to comply with the law, it must be said that plaintiff's complaint contem-

plated a modification in the treatment of all prisoners subject to disciplinary actions based on information obtained from confidential informants. Section 1988 is designed to provide an incentive to the ordinary citizen to enforce the Constitution whenever it is violated so that the rights of all similarly-situated persons will be better protected. It is not a prerequisite to an award of attorney's fees under section 1988 that the plaintiff request sweeping changes in the defendants' practices and procedures. The district court erred as a matter of law in finding that the plaintiff's catalyst argument was not entitled to consideration because the plaintiff had failed to request relief of the same general type as that obtained in the revised regulation.

While the effect of the plaintiff's suit on the revised regulations may fulfill the requirements of section 1988, it is beyond the function of a reviewing court to make such a determination. On remand, the district court must determine whether the plaintiff's suit caused or was a catalyst for the revision of Administrative Directive 801. If plaintiff can establish causation between his suit and "some of the benefit sought," he is a prevailing party on this issue for purposes of section 1988. Id. at 1167. We find sufficient evidence of causation to warrant a hearing before the district court. The timing of the promulgation of the revised regulations in relation to the courts of this suit is sufficient to suggest that the district court should review carefully the causation

issue. We will remand this case to the district court for an appropriate hearing.

V.

We find that the district court erred in holding that plaintiff was not entitled to an award of attorney's fees pursuant to 42 U.S.C. § 1988 on the basis of the relief obtained in the course of the litigation. We also find that the district court erred in failing to conduct further fact finding on the plaintiff's argument that his suit acted as a catalyst for the promulgation of the revisions of Administrative Directive 801. Consequently, we will reverse the district court's order of March 14, 1985 and will remand the case

to the district court fo a hearing on the plaintiff's catalyst argument and for calculation of the fee award.

A True Copy:

Teste:

Clerk of the United States Court
Of Appeals for the Third Circuit

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

AARON HELMS, Plaintiff	:	
v.	:	Civil Action No. 79-0950
LOWELL D. HEWITT, et al., Defendants	:	

MEMORANDUM

This action was commenced on July 26, 1979. On August 15, 1980, ruling on cross-motions for summary judgment, this court denied plaintiff's motion and entered judgment for defendants. On June 30, 1981, the Court of Appeals for the Third Circuit reversed the judgment and taxed costs in favor of plaintiff. Helms v. Hewitt, 655 F.2d 487 (3d Cir. 1981). The defendants petitioned for writ of certiorari on the issue of what process was due for admini-

strative confinement prehearing. The petition was granted by the Supreme Court on March 8, 1982, Hewitt v. Helms, 455 U.S. 999 (1982) and on February 22, 1983 the Supreme Court reversed the judgment of the Court of Appeals. Hewitt v. Helms, 459 U.S. 460 (1983). On June 29, 1983, the matter was remanded by the Court of Appeals to this court for further proceedings on the issue of whether defendants acted reasonably in light of existing law when finding plaintiff guilty based on evidence provided by an unidentified informant. Helms v. Hewitt, 712 F.2d 48 (3d Cir. 1983). Both plaintiff and defendants filed motions on the remaining issue of qualified immunity and on February 3, 1984 the court denied plaintiff's motion and ruled in favor of the

defendants. A second appeal to the Circuit Court followed. Both parties challenged this court's judgment. This court's judgment was affirmed on August 21, 1984.

Plaintiff's counsel has now filed an application for attorney's fees. The matter has been briefed and is ripe for decision.

In the instant case, plaintiff brought suit complaining in part that his constitutional right to due process had been violated by his conviction on disciplinary charges based upon an unverified and unsubstantiated account of an unidentified informant. On this issue the Court of Appeals for the Third Circuit held

> [T]hat a prisoner is denied due process when his conviction on disciplinary charges rests solely on the

> hearsay report of an unidentified informant's account which offers no basis for an independent assessment of the informant's credibility or reliability.

Helms v. Hewitt, 655 F.2d 487 at 503 (3d Cir. 1981). Plaintiff's claim for damages on this issue was ultimately dismissed based on official immunity. This judgment was affirmed on August 21, 1984.

In addition to damages, plaintiff sought injunctive relief in the form of expungement of his disciplinary conviction from his records and return to the custody status he enjoyed prior to December 3, 1978. Petitioner did not receive any injunctive relief.

Effective May 1, 1984, the Bureau of Corrections of the Commonwealth of Pennsylvania issued Administrative Directive 801: Inmate Disciplinary Procedures. This directive detailed the procedures to be followed with respect to the use of confidential source information. No relevant regulations with respect to confidential source information existed previously.

Plaintiff argues that he is a prevailing party as a result of (1) the Third Circuit opinion on the confidential informant issue, even though his damage claim was not allowed based on official immunity; and (2) the subsequent issuance of Administrative Directive 801.

Defendants argue that plaintiff is not a prevailing party. They contend that he received none of the relief

requested in his Complaint. With respect to the Administrative Directive, defendants point out that plaintiff never sought as relief a change in policy nor did the change benefit the plaintiff who has not been in the state system since the change occurred.

Defendants also argue that the petition for fees is untimely pursuant to Local Rule 804.2, which states in pertinent part

> Bills of costs, unless an extension is granted, shall be filed no later than 30 days after entry of final judgment.

This petition was filed three and one-half months after the Court of Appeals affirmed this court's decision.

The Court in Brown v. City of Palmetto, Ga., 681 F.2d 1325, 1326 (11th Cir. 1982) held as follows:

Contrary to general rule, 42 U.S.C. § 1988 allows attorney's fees in 1983 actions to be treated as part of the costs of litigation. Rule 54(d) of the Federal Rules of Civil Procedure, which provides for the awarding of costs, does not limit the period of time in which a motion for costs may be made. Consequently, there is no jurisdictional time limit on the filing of a motion for attorney's fees under section 1988. Brown contends however, that defendants' delay of four months before filing their motion for attorney's fees violated a local court rule requiring bills of cost to be filed within thirty days after the time judgment is entered. District courts may adopt local rules establishing timeliness standards for the filing of claims for attorney's fees. Such local rules may provide that such claims must be included in and filed within the time allowed

> for motions for other costs. There are, however, significant distinctions between attorney's fees and other costs. Inclusion of a claim for attorney's fees within the time constraints applicable to requests for other costs should be by explicit provision of the local rules. Absent violation of a local rule a claim for attorney's fees would be untimely only on a showing of unfair surprise or prejudice. There is nothing in the local rule under consideration to indicate that it was intended to include claims for attorney's fees under 42 U.S.C. § 1988. Additionally, Brown failed to make any showing of unfair prejudice or surprise. Consequently, we find that defendants' motion for an award of attorney's fees was timely filed. (Citations omitted)

In Inmates of Allegheny County Jail v. Pierce, 716 F.2d 177, 179 (3d Cir. 1983), the court held that absent a

> local rule establishing a time limit, the timeliness of an application for attorney's fee is a matter for the district court's discretion. An application should be denied as untimely if the lateness of its filing causes unfair surprise or prejudice to the defendant. (Citations omitted)

Defendants have asserted no unfair surprise or prejudice. The court will deem the application as timely filed.

In order to recover attorney's fee awards under 42 U.S.C. § 1988, the court must determine whether the plaintiff in this action is a prevailing party. N.A.A.C.P. v. Wilmington Medical Center, Inc., 689 F.2d 1161 (3d Cir. 1982). In order to be a prevailing party for purposes of section 1988, a plaintiff must establish his entitlement to some form of relief on the merits of a substantial claim, Dover v. Rose, 709

F.2d 436 (6th Cir. 1983). Some circuits have held that a plaintiff may qualify as a prevailing party if his lawsuit acts as a "catalyst" which causes the defendant to make significant changes in its past practices, although no direct relief is granted. Othen v. Ann Arbor School Board, 699 F.2d 309, 313 (6th Cir. 1983). The catalyst argument, however, cannot be overly broad. The standard used in this circuit for determining prevailing party status is whether the plaintiff achieved "some of the benefit sought by bringing the suit." N.A.A.C.P., supra at 1167, 1169.

In Othen, supra at 313, the Sixth Circuit held that plaintiff was not entitled to fees because he obtained none of the relief sued for. However, the court in N.A.A.C.P., supra stated

> The issue is not whether plaintiffs obtained the form or extent of relief they originally requested but whether the substance of the litigation's outcome...provided much of the relief appellants had initially sought.

N.A.A.C.P., supra, p. 1169.

As stated in Othen, supra at 314, if the requesting party has not prevailed in fact, that is the end of the matter. In this case, while the court found a constitutional violation, the defendants were held to be immune from liability for compensatory damages. Plaintiff's requests for injunctive relief were moot since plaintiff was no longer in prison to receive the benefits of his requested relief. Thus, while the plaintiff may claim a moral victory by the issuance of

Administrative Directive 801, he has failed to prove that he was entitled to relief. Dover v. Rose, 709 F.2d 436, 439 (6th Cir. 1983).

In Ross v. Horn, 598 F.2d 1312, 1322 (3d Cir. 1979), Judge Higginbotham, speaking for the court, held that if new procedures, which provided much of the relief appellants had initially sought, were implemented as a result of the lawsuit, the appellants were prevailing parties with respect to a protion of their claims (which claims were thereby effectively mooted) irrespective of the judgment entered against them. In the instant case, however, plaintiff did not seek any relief which became mooted during the controversy; nor did he seek relief in the form of corrective procedures by the Bureau of Corrections in the use of undisclosed informants.

For the foregoing reasons, plaintiff is not deemed to be a prevailing party and thus, is not entitled to attorney's fees.

Sylvia H. Rambo
United States District Judge

DATED: March 14, 1985

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

AARON HELMS, Plaintiff	:	
v.	:	Civil Action No. 79-0950
LOWELL D. HEWITT, et al., Defendants	:	

ORDER

For the reasons stated in the accompanying memorandum, IT IS HEREBY ORDERED THAT plaintiff's Petition for Attorney's Fees is denied.

Sylvia H. Rambo
United States District Judge

DATED: March 14, 1985

Supreme Court, U.S.
FILED
MAY 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1630

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

LOWELL D. HEWITT, Supt.;
B. B. KYLER, CO. III;
R. E. STOTELMYER, Major;
B. K. SMITH, Counselor III;
K. R. HILEMAN, Farm Manager;
D. R. ERHARD, Deputy Supt.
for Treatment;
T. W. HENRY, Director of Treatment;
W. W. MATEER, C. I., Manager

Petitioners

vs.

AARON HELMS,

Respondent

RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS FOR THE THIRD CIRCUIT

John M. Humphrey, Esquire
Attorney for Respondent
161 West Third Street
P.O. Box 215
Williamsport, PA 17701
(717) 323-8711)

TABLE OF AUTHORITIES

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Johnson vs. Comp. Pa. Bd. of Probation and Parole, 482 A.2d 235 (Pa. 1984)	8
Kentucky vs. Graham, _____ U.S. _____, 105 S. Ct. 3099 (1985)	2
Lane vs. Reid, 559 F. Supp. 1047, 1052 (S.D. N.Y. 1983)	6
Othen vs. Ann Arbor School Board, 699 F.2d 309 (6th Cir. 1983)	3,4
Pulliam vs. Allen, _____ U.S. _____, 104 S. Ct. (1970)	6

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Tucker vs. Summers, C.A. No. 85-3355 (5th Cir., March 10, 1986) 7

1. In his Complaint the Plaintiff sought broad relief including a declaration that the Defendants' policies with regard to the use of a hearsay account of uncorroborated information from a single unidentified informant be declared unconstitutional (Pet. App. 17a). The Court of Appeals specifically declared that the Defendants' practices were unconstitutional. Helms vs. Hewitt, 655 F.2d 487, 503 (3rd Cir. 1981) (Helms I) (Pet. App. 18a - 19a). Further, not only were the policies declared unconstitutional, but the Court of Appeals set forth specific procedures that "must be followed to provide minimum due process." Id. at 502. These procedures serve as a standard of conduct to guide prison officials in the future. (Pet. App. 19a). While the Petitioners appealed parts of the Court's holding in Helms I, the Petitioners took no appeal on that

part of the opinion which declared their practices with regard to unidentified informants to be unconstitutional.

Petitioners then, while the case was still pending final review on appeal, promulgated regulations specifically addressing the use of hearsay reports based on information from confidential informants in prison disciplinary proceedings. (Pet. App. 21a). The Third Circuit found that in light of the above facts, Plaintiff had obtained relief of the same general type as requested during the course of the litigation and further remanded the case to the district court for hearing on whether Plaintiff's suit was a catalyst for the promulgation of the Petitioner's regulations.

2. Petitioner's reliance on Kentucky vs. Graham, _____ U. S. _____, 105 S. Ct. 3099 (1985), is misplaced. Graham involved an action seeking only

money damages where attorney's fees were being sought from the State of Kentucky who was not and could not be a party to the case. The court held that the state could not be liable for attorney's fees because it was not and could not be a party to the action. The court addressed who could be prevailed against, not "the nature or degree of success necessary to make a plaintiff a prevailing party." Id. at 3105 n. 9.

3. Petitioners try to create a false conflict between the circuits with respect to the issue of who is a prevailing party. In this regard, Petitioners cite Dover vs. Rose, 709 F.2d 436 (6th Cir. 1983) and Othen vs. Ann Arbor School Bd., 699 F.2d 309 (6th Cir. 1983) as being in conflict with the opinion of the Third Circuit.

In Othen, a father brought a sex discrimination suit alleging that his

daughter was being denied an opportunity to compete on the school golf team because of her sex. The father ultimately withdrew his complaint. There was no question of declaratory relief in Othen and the father had shown no entitlement to relief or shown that his lawsuit was a catalyst which caused the policy of the defendants to change. The reason for denying the fees in Othen was simply that nothing had occurred as a result of plaintiff's lawsuit. The Othen court did specifically note that a plaintiff could be a prevailing party if his lawsuit did act as a catalyst which caused the defendant to change its past practices. In Dover vs. Rose, supra., there was again no request for any type of declaratory relief. The court specifically noted this fact three separate times in their opinion. Dover vs. Rose, supra. at 437, 439. The Dover court, however, also

specifically noted that a party could prevail if his suit acted as a catalyst in causing the defendants to alter their past practices. The plaintiff, however, did not even allege that his suit had acted as a catalyst. Id. at 439. Finally, in a case recently affirmed by this Court, the Fourth Circuit set forth language from the House Report which indicates why relief should be granted in cases such as this.

> Furthermore, while damages are theoretically available under the statutes covered by (Section 1988), it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy. Consequently, awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal, Civil and Constitutional rights are to be adequately protected.

H. R. Rep. No. 1558, 94 Cong., 2nd Sess. 9 (1976); as cited in Allen vs. Burke, 690

F.2d 376 at 379 (4th Cir. 1982), aff'd. sub nom Pulliam vs. Allen, _____ U. S. _____, 104 S. Ct. (1970).

The opinions cited by the Petitioner, therefore, do not address the prevailing party issue which was before the Third Circuit except with regard to the catalyst issue and on the catalyst issue they strongly support the holding of the Third Circuit.

4. While Petitioners focus upon mootness, Respondent seriously questions this emphasis. See Lane vs. Reid, 559 F. Supp. 1047, 1052 (S.D. N.Y. 1983). First, contrary to the Petitioners' assertion that the regulations were promulgated long after the litigation, the regulations were in fact promulgated while this case was on appeal to the Third Circuit. Second, while Petitioner cites cases dealing with improperly granted injunctive relief, Petitioner cites no case where declaratory

relief was involved. In fact, the case of Tucker vs. Summers, C.A. No. 85-3355 (5th Cir., March 10, 1986) denied relief based upon the preliminary injunction because they court had no subject matter jurisdiction, but the court also went on to analyze whether the lawsuit had acted as a catalyst in motivating the defendants to end their unconstitutional behaviour. Based upon the testimony of defendants, the court found that the lawsuit had not acted as a catalyst. Finally, under Pennsylvania law "a prisoner on parole is still in the legal custody of the warden of the institution from which he was paroled and he is under the control of the warden until the expiration of the term of his sentence." Commonwealth vs. Russell, 403 Pa. 320, 169 A.2d 884 at 885 (1961); Hendrickson vs. Pennsylvania State Board of Parole, 409 Pa. 204, 185 A.2d 581, 584 (1962); cited with approval in

Johnson vs. Comp. Pa. Bd. of Probation and Parole, 482 A.2d 235 (Pa. 1984). [1]

5. Even if mootness were considered an issue, this case would not be well suited for a grant of review of the prevailing party issues involved. It has been almost 7 years since this case was initially begun and, even under a liberal interpretation of the Petitioner's case law, this case would still have to be remanded to the district court to determine whether Plaintiff's lawsuit was a catalyst in causing the Defendants to change their unconstitutional practices. Further, as suggested in the Third Circuit's opinion, given the fact that the

[1] It is also worth noting that the Respondent, Aaron Helms, is presently incarcerated, under a new sentence, in the Pennsylvania Prison System. (Affidavit attached)

regulations were promulgated during the pendency of the appeal, (Pet. App. 10a) there is strong indication that the Respondent's lawsuit in fact caused the regulations to be promulgated. (Pet. App. 10(a), 24(a)).

Respondent, therefore, respectfully requests this Court to deny the Petition for Writ of Certiorari.

RIEDERS, TRAVIS, MUSSINA,
HUMPHREY & HARRIS

BY: _____

John M. Humphrey, Esquire
Attorney for Respondent
161 West Third Street
P.O. Box 215
Williamsport, PA 17701

(M8640528)

No. 85-1630

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1985

LOWELL D. HEWITT, Supt.;
B. B. KYLER, CO. III;
R. E. STOTELMYER, Major;
B. K. SMITH, Counselor III;
K. R. HILEMAN, Farm Manager;
D. R. ERHARD, Deputy Supt.
for Treatment;
T. W. HENRY, Director of Treatment;
W. W. MATEER, C. I., Manager

Petitioners

vs.

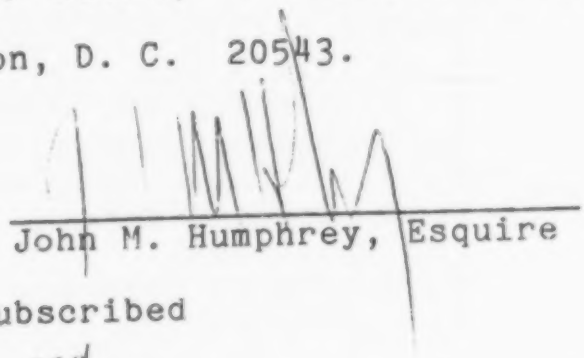
AARON HELMS,

Respondent

AFFIDAVIT OF MAILING

I, JOHN M. HUMPHREY, ESQUIRE, being duly sworn according to law, depose and state that on this 5th day of May, 1986, I mailed by first-class mail the foregoing Respondent's Memorandum in

Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit to United States Supreme Court, 1 First Street, N.E., Washington, D. C. 20543.



John M. Humphrey, Esquire

Sworn to and subscribed
before me this 2nd day
of May , 1986

Kimberly A. Lepley
Notary Public

KIMBERLY A. LEPLEY, Notary Public
Williamsport, Lycoming Co., Pa.
My Commission Expires April 6, 1987

No. 85-
IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

LOWELL D. HEWITT, Supt.;
B. B. KYLER, CO III;
R. E. STOTELMYER, Major;
B. K. Smith, Counselor III;
K. R. Hileman, Farm Manager;
D. R. Erhard, Deputy Supt. for Treatment;
T. W. HENRY, Director of Treatment;
W. W. MATEER, C. I., Manager
Petitioners

v.

AARON HELMS,
Respondent

AFFIDAVIT OF
RICHARD G. FISHMAN

COMMONWEALTH OF PENNSYLVANIA

COUNTY OF CENTRE

I, Richard G. Fishman, Esquire, being duly sworn according to law depose and state that on this 30th day of April, 1986, I spoke telephonically with Robert Best, Records Supervisor for the Pennsylvania Department of Corrections,

who advised me that the Respondent in the above-captioned matter, Aaron Helms, was presently incarcerated at the State Correctional Institution, Graterford, Pennsylvania, and that he had been received into that institution on April 12, 1985.

Richard G. Fishman, Esq.

Sworn to and subscribed
before me this 30th day
of April, 1986.

Barbara Johnson
Notary Public

BARBARA JOHNSON, Notary Public
State College, Centre County, Pa.
My Commission Expires September 25, 1989

(3)

Supreme Court, U.S.
FILED
MAY 14
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1630
IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1985

LOWELL D. HEWITT, Supt.;
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v.

AARON HELMS,
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REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LeROY S. ZIMMERMAN
Attorney General

ALLEN C. WARSHAW
Executive Deputy
Attorney General
Director,
Commonwealth
Agencies Legal
Services Division

ANDREW S. GORDON
Chief Deputy
Attorney General
Chief, Litigation
Section

FRANCIS R. FILIPI
Senior Deputy
Attorney General
Counsel of Record

GREGORY R. NEUHAUSER
Senior Deputy
Attorney General

Attorneys for Petitioners

Office of Attorney General
15th Fl., Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

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IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1985

No. 85-1630

LOWELL D. HEWITT, et al.,

Petitioners

v.

AARON HELMS,

Respondent

REPLY TO RESPONDENT'S MEMORANDUM
IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

ARGUMENT

RESPONDENT CANNOT BE REGARDED AS A PREVAILING PARTY BECAUSE HE HAD NO STANDING TO REQUEST EQUITABLE RELIEF.

In opposition to the petition for writ of certiorari, respondent Helms makes several contentions most of which have been addressed by petitioners in the petition. One argument, however, necessitates a reply.

Helms takes issue with petitioners' argument on mootness and standing. He places great weight on the proposition that, under state law, a parolee continues to be under the legal authority of the state corrections officials even after release from incarceration. From this premise, he argues that he possessed the requisite standing to seek declaratory and injunctive relief even after his parole. To the extent that this

position reflects a correct statement of Pennsylvania law insofar as applicable to the state's authority to revoke parole, it nevertheless ignores important factual circumstances in this case.

There simply was no live case or controversy between Helms and petitioners, with the exception of his claim for damages for past violations, by the time of the first appeal to the Court of Appeals. He lacked standing at that point to request, much less recover, equitable relief. City of Los Angeles v. Lyons, 461 U.S. 95 (1983); Rizzo v. Goode, 423 U.S. 362 (1976). In Lyons, the Court reiterated that past exposure to illegal conduct does not, in and of itself, present a live case or controversy regarding injunctive relief "if unaccompanied by any continuing, present

adverse effects." Lyons, 461 U.S. at 102, citing O'Shea v. Littleton, 414 U.S. 488, 495-96 (1974). Just as in Lyons and O'Shea, the prospect that respondent here would be subjected to the same real and immediate threat of repeated injury was, at best, extremely remote by the time of his parole. It had to be "assumed" that Helms would "conduct [his] activities within the law and so avoid prosecution and conviction as well as exposure to the challenged course of conduct said to be followed by petitioners." Lyons, 461 U.S. at 103, quoting O'Shea v. Littleton, 414 U.S. at 497. Simple anticipation that, at some point, Helms would be re-arrested, re-convicted and returned to a Pennsylvania prison where he would be cited for

misconduct supported by information from a confidential informant, is too speculative to support standing. Lyons, 461 U.S. at 103-05.

Without the requisite standing, it hardly can be argued that Helms was a prevailing party on a claim for equitable or declaratory relief. To be a prevailing party, he must be able to contend that his claims for relief other than damages, for which petitioners were immune, presented a live case or controversy. For the Court of Appeals to find prevailing party status, in the absence of standing to request the prerequisite underlying relief, is to elevate a claim of "abstract injury" to Article III jurisdiction. Certainly, this is not what the Congress intended when it enacted the Civil Rights Attorneys Fees Awards Act, 42 U.S.C. §1988.

CONCLUSION

For these reasons and the reasons expressed in the petition for writ of certiorari, the petition should be granted and, upon review, the judgment of the Court of Appeals reversed.

Respectfully submitted,

LeROY S. ZIMMERMAN
Attorney General

ALLEN C. WARSHAW
Executive Deputy Attorney
General Director,
Commonwealth Agencies
Legal Services Division

ANDREW S. GORDON
Chief Deputy Attorney General
Chief, Litigation Section

GREGORY R. NEUHAUSER
Senior Deputy Attorney General

FRANCIS R. FILIPI
Senior Deputy Attorney General
Counsel of Record

Office of Attorney General
15th Fl., Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

NO. 85-1630

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

Supreme Court, U.S.
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JOINT APPENDIX

LeROY S. ZIMMERMAN
Attorney General

ALLEN C. WARSHAW
Executive Deputy
Attorney General

GREGORY R. NEUHAUSER
Senior Deputy Attorney
General

Office of Attorney General
Commonwealth of Pennsylvania
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

Attorneys for Petitioners

JOHN M. HUMPHREY
Rieders, Travis,
Mussina, Humphrey
and Harris
161 West Third St
P.O. Box 215
Williamsport,
PA 17701
(717) 323-8711

Attorneys for
Respondent

Petition Filed April 3, 1986
Certiorari Granted June 16, 1986

JOINT APPENDIX

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CIVIL DOCKET ENTRIES NO. 79-950

DATE	NR	PROCEEDINGS
07/26/79	1	COMPLAINT
07/26/79	2	PETITION - of plaintiff to proceed in forma pauperis;
07/27/79	5	SUMMONS - issued and handed to U.S. Marshal for service with c.c. order and copy complaint and Doc. 3 attached.
12/7/79	23	AMENDED COMPLAINT - of Plaintiff, and C of S.
08/15/80	41	ORDER - of Court, IT IS HEREBY ORDERED THAT: (1) Plaintiff's motion for summary judgment is denied; (2) Defendants' cross-motion for summary judgment is granted; (3) Judgment is entered in favor of defendants.(R)
07/24/81		JUDGMENT OF COURT OF APPEALS - on consideration whereof, it is now here ordered and adjudged by this court that the judgment of the District Court, dated August 15, 1980, be, and the same is hereby reversed and the case is remanded for further

		proceedings not inconsistent with the opinion of this Court.
03/30/83	54	JUDGMENT - of Supreme Court of U.S. dated 2/22/83. Ordered and adjudged that judgment of U.S. Court of Appeals for Third Circuit is REVERSED and that cause is REMANDED TO Third Circuit for further proceedings in conformity with the opinion of this court.
07/25/83	59	ORDER ON REMAND - of the court of appeals remanding case from the Supreme Court of the U.S. -- issued in lieu of formal mandate. ORDERED that judgment of court of appeals filed 6/30/81 be VACATED only insofar as we directed a remand of the case to provide the defendants an opportunity to prove that they afforded Helms his constitutional rights before the December 8 (hearing committee). Judgment of the district court will be AFFIRMED insofar as it dismissed plaintiff's claims based on the denial of due process in the proceedings before the Hearing Committee on 12/8/78. In all other respects,

CIVIL DOCKET ENTRIES NO. 79-950
(continued)

DATE	NR.	PROCEEDINGS
		the judgment of this court (ct. of appeals) entered 6/30/81 will remain in full force and effect. The cause will be remanded for further proceedings consistent with our original opinion as modified. (Rosenn, J). Dated 6/29/83
02/03/84	68	ORDER of Court IT IS HEREBY ORDERED THAT: (1) plaintiff's motion for summary judgment is denied; (2) Defendants' motion for summary judgment is granted; (3) Clerk of the Court is directed to enter judgment for the defendants and close the file on this case.(R)
02/03/84	69	JUDGMENT - of Clerk IT IS ORDERED AND ADJUDGED that judgment be and hereby is entered in favor of the defendants and against the plaintiff.

CIVIL DOCKET ENTRIES NO. 79-950
(continued)

09/13/84	73	JUDGMENT/ORDER of Court of Appeals, IT IS ADJUDED AND ORDERED that the judgment of the District Court entered 2/3/84 be and the same is hereby affirmed.
12/07/84	74	PETITION - of plaintiff for Attorney's Fees, and AFFIDAVIT of Richard G. Fishman, Esquire and C. of S.
03/14/85	79	MEMORANDUM - of Court, and ORDER - that plaintiff's Petition for Attorney's Fees is denied. (R)
3/20/85	80	SUPPLEMENT - to Pltff's Petition for Attorney's Fees, w/Affidavit of John M. Humphrey, Esquire attached, and SUPPL/AFFID - of counsel concerning Attorney's Fees w/breakdown and C. OF S. H 3/22/85 w/c docket
4/8/85	81	NOTICE OF APPEAL - of plaintiff from Order of Court dated 3/14/85. Copies to counsel and U.S. Court of Appeals along with cert. copy of

CIVIL DOCKET ENTRIES NO. 79-950
(continued)

		Order of 3/14/85 and cert. copy of docket entries and T/L #1. Copy to Judge Rambo. TRANSCRIPT PURCHASE ORDER - mailed to Atty. Humphrey.
1/28/86	85	JUDGMENT - of Court of Appeals, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered 3/14/85, be, and the same is hereby reversed and the cause remanded to the said District Court with direction to con- duct a hearing on pltff's catalyst argument and for calculation of the fee award.
2/20/86	87	JUDGMENT - by Judge Mansmann, Cir. Judge submitted by the clerk granting the request for atty's fees in the amount of $3,719.
2/21/86	89	ORDER - All counsel having agreed to a postponement of any hrg in this matter IT IS HEREBY ORDERED THAT counsel shall submit a stat. rpt. to the Ct. w/in 60 days

CIVIL DOCKET ENTRIES NO. 79-950
(continued)

	of the date of this order. The status rpt shall specify 1) Whether counsel for the state intends to petition for certiorari; and 2) If not, whether the parties can reach a compromise on the amt of the atty's fees in question w/out the necessity of a hrg. (R) cc: Ct; all counsel.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

AARON HELMS, Plaintiff	:	Civil Action No. 79-950
v.	:	
LOWELL D. HEWITT, Superintendent, B.B. KYLER, CO III, R.E. STOTELMYER, Major, B.K. SMITH, Counselor III, K.R. HILEMAN, Farm Manager, D.R. ERHARD, Deputy Superintendent for Treatment, T.W. HENRY, Director of Treatment, W.W.MATEER, C.I. Manager State Correctional Institution Drawer R, Huntingdon, Pennsylvania, Defendants	:	

AMENDED COMPLAINT

I. INTRODUCTION

1. This is a civil action for damages and declaratory and injunctive relief by an inmate against various prison officials for an unreasonable and illegal delay in affording him various due process procedural guarantees in disciplining him for alleged misconduct and then convicting him on the basis of an alleged informant whose credibility,

reliability, and factual knowledge of the incident in question was never confirmed and set forth in the record, nor was any written statement of the alleged informant presented.

II. JURISDICTION

2. The plaintiff invokes the jurisdiction of this Court pursuant to 28 U.S.C. §§ 1331 and 1343 to redress the deprivation by defendants under color of state law, statute, ordinance, regulation, custom or usage of rights, privileges, and immunities secured directly by the Fourteenth Amendments to the United States Constitution and under Title 42 U.S.C. § 1983. Plaintiff's request for declaratory relief is authorized by 28 U.S.C. § 2201, 2202 and Rule 57 of the F.R.Civ.P.

III. PARTIES

3. Plaintiff is an adult individual who at all times relevant herein was incarcerated at the State Correctional Institution (hereinafter SCI) at Huntingdon, but is presently incarcerated at SCI Graterford.

4. Defendant Lowell D. Hewitt was at all times relevant herein employed as Superintendent of SCI Huntingdon by Pennsylvania Department of Justice, Bureau of Correction. In such capacity it is his function to govern and manage SCI Huntingdon on a day to day basis and assume responsibility of its internal affairs and operations as well as safekeeping, discipline and employment of inmates of said institution, including but not necessarily limited to the duties and functions set forth at 71 P.S. § 304, 306; 61 P.S. § 650 and 37

Pa. Code § 95.103(h)(7); 8 Pa.B. 2686. He is sued in his official and individual capacities.

5. Defendants Kyler, Stotelmyer, Smith, Hileman, Erhard, Henry and Mateer were at all times relevant herein employed as correctional officers or civilian employees at SCI Huntingdon by the Pennsylvania Department of Justice, Bureau of Correction. They were employed at the ranks or job titles set forth in the captioned to the Complaint. They are sued in their official and individual capacities.

IV. STATEMENT OF FACTS

6. On December 3, 1978 at approximately 7:50 p.m., a disturbance broke out at SCI Huntingdon which resulted in the injury of several correctional officers and inmates and said disturbance was quelled or order restored that same evening.

7. All inmates in the institution were confined to their cells the remainder of the evening on December 3, 1978. The general inmate population was released from confinement in their cells on December 4, 1978.

8. As a result of this incident of December 3, 1978, the Commonwealth of Pennsylvania and its agents, servants, and employees, including the State Police, Bureau of Correction and the Defendants and their agents, servants, and employees began an

investigation of various inmates, including the plaintiff in order to determine whether there was evidence of violation of the criminal laws of this state or misconduct regulations of the Bureau of Correction by the Plaintiff and other inmates allegedly involved in the disturbance.

9. On December 3, 1978, at approximately 10:00 p.m., plaintiff was placed in administrative close or maximum custody on B Block at SCI Huntingdon, pending investigation for alleged involvement in the disturbance of that evening.

10. On December 4, 1978 at approximately 3:35 p.m. plaintiff received an institutional misconduct for allegedly conspiring to riot and disrupt normal institutional routine by forcefully taking over the control room and

assaulting correctional officers which included Officer Rhodes, as a result of the institutional disturbance the day before.

11. On December 8, 1978, plaintiff was informed by an institutional hearing committee that his disciplinary case and confinement status was continued pending completion of the investigation by the state police pursuant to administrative directive .004 and because of insufficient evidence to support the misconduct charges against him.

12. On December 11, 1978 plaintiff was charged criminally in alleged violation of the laws of Pennsylvania, with assaulting correctional officer Rhodes and riot.

13. On or about Janaury 2, 1979, plaintiff was informed by an institutional program review committee which was composed of the defendants

Erhard, Henry and Mateer that his restricted confinement status was continued pending the completion of the state police investigation and pursuant to administrative directive .004. Said decision was concurred in by the defendant Hewitt.

14. On or about January 6, 1979 the criminal charges of assault and riot against plaintiff were dismissed and on or before this date the criminal investigation of plaintiff was completed by the Commonwealth of Pennsylvania and its agents, servants and employees.

15. On January 19, 1979, the plaintiff was charged by defendant Kyler with the institutional misconduct of assault on Sgt. Phillips arising out of the disturbance of December 3, 1978. Said charge was allegedly based on information supplied by a confidential informant.

16. On January 22, 1979 plaintiff was found guilty by an institutional hearing committee composed of the defendants Stotelmyer, Smith and Hileman on the misconduct charge of assaulting Sgt. Phillips based on information allegedly supplied to the defendant Kyler by an alleged informant. The misconduct charges of assault and conspiracy of December 4, 1978 were dismissed with no action having been taken on them or a violation found.

17. At the misconduct hearing of January 22, 1979, the credibility, reliability and factual knowledge of the incident by the alleged informant was never confirmed and set forth in the record, nor was any written statement of the alleged information presented.

18. The plaintiff was sentenced on January 22, 1979 to six (6) months in disciplinary close custody by the hearing committee effective from December 3, 1978 and recommended for transfer for separation from SCI Huntingdon which transfer has since taken place.

19. The action of the institutional hearing committee of January 22, 1979 was the first adjudication or finding of plaintiff's alleged misconduct arising out of the institutional disturbance of December 3, 1978, even though he had been confined in restrictive close or maximum custody since that date and the emergency created by the disturbance had ended on or before December 12, 1978.

20. The defendant Hewitt has on a monthly basis reviewed the decisions of the program review committee of the

institution and concurred in their decisions to keep plaintiff in restrictive close or maximum custody and recommend his transfer and he has otherwise refused to reverse plaintiff's disciplinary conviction of January 22, 1979.

21. The plaintiff has suffered immediate and irreparable harm from the misconduct convictions set forth in this complaint as to obtaining a minimum classification, pre-release and parole and has suffered immediate and irreparable harm from the debilitating conditions while confined in restrictive close or maximum custody including but not necessarily limited to a lack of participation in vocational, educational and rehabilitative programs or facilities, a lack of exercise and almost constant harrassment.

22. Defendants have at all times relevant herein, acted maliciously, wantonly, and with reckless disregard of the clearly established rights of the plaintiff.

V. CAUSES OF ACTION

23. The continuation of plaintiff in close or maximum custody for over ten (10) days without a prior finding of a misconduct or behavioral violation violated 37 Pa. Code § 95.104 (b)(3), 8 Pa.B. 2687 and thus denied plaintiff due process of law in the defendants failure to follow their own regulations as guaranteed directly by the Fourteenth Amendment to the United Statcs Constitution and under 42 U.S.C. § 1983.

24. The failure to hold a due process disciplinary hearing or convict plaintiff of misconduct charges arising

out of the disturbance of December 3, 1978 until January 22, 1979 denies plaintiff due process of law as guaranteed directly by the Fourteenth Amendment to the United States Constitution and under 42 U.S.C. § 1983.

25. The use of alleged informant's information to convict plaintiff or misconduct as set forth in this Complaint violates principles of fundamental fairness as guaranteed directly by the due process clauses of the Fourteenth Amendment to the United States Constitution and under 42 U.S.C. § 1983.

WHEREFORE, plaintiff prays this Honorable Court:

1. Enter a declaratory judgment, declaring plaintiff's rights under the Fourteenth Amendment and 42 U.S.C. § 1983 violated as more specifically set forth in this Complaint.

2. Enter a permanent injunction enjoining and restraining the defendants from confining plaintiff in restrictive custody of any kind as a direct or indirect result of the institutional disturbance at SCI Huntingdon on December 3, 1978 and ordering plaintiff returned to the custody status he enjoyed before December 3, 1978.

3. Order the reversal of the disciplinary conviction set forth in this Complaint and order it expunged from plaintiffs inmate, institutional and Bureau of Correction records.

4. Permit plaintiff to proceed in forma pauperis.

5. Award plaintiff's counsel costs and attorney's fees pursuant to 42 U.S.C. § 1988.

6. Enter judgment in plaintiff's favor and against defendants for monetary relief, including compensatory and punitive damages.

7. Enter such other relief, as may be necessary and proper.

/S/
RICHARD G. FISHMAN, ESQUIRE
Keystone Legal Services, Inc.
251 South Pugh Street
State College, PA 16801
814/238-4958

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

AARON HELMS, Plaintiff	:	Civil Action No. 79-0950
v.	:	
LOWELL D. HEWITT, et al.,	:	
Defendants	:	

M E M O R A N D U M

Procedural History

Plaintiff filed his complaint on July 26, 1979. On August 12, 1979, defendants filed a motion to dismiss or in the alternative for summary judgment. On September 28, 1979, the magistrate recommended granting defendants' summary judgment. On November 7, 1979 this court declined to adopt the magistrate's recommendation. Instead, it agreed with plaintiff that material factual issues remained unresolved. On November 16,

1979, defendants filed an answer to the original complaint, asserting that they were entitled to a finding of qualified immunity. On May 12, 1980, plaintiff filed his motion for summary judgment, together with a brief which asserted that defendants were not entitled to a qualified immunity. That brief, however, did not address the applicability of qualified immunity to the informant issue. Defendants, on May 27, 1980, filed a cross-motion for summary judgment. In their supporting brief, defendants again asserted that they were entitled to qualified immunity. On August 15, 1980, this court granted summary judgment for the defendants on the ground that it found that no violation of any right secured by the constitution had occurred. Because its decision to grant the summary judgment was based on a finding of no constitutional

violation, this court found it unnecessary to address the qualified immunity argument.

On June 30, 1981, the Court of Appeals for the Third Circuit reversed the judgment of this court and remanded the case for further proceedings in accordance with its findings. Helms v. Hewitt, 655 F.2d 487, 503 (3d Cir. 1981). A petition for certiorari to the Supreme Court was filed on September 24, 1981 and was granted on March 8, 1982. Hewitt, et al v. Helms, 455 U.S. 999 (1982). The informant issue was not included in this petition. On February 22, 1983, the United States Supreme Court reversed the judgment of the Court of Appeals for the Third Circuit on the "protected liberty interest" issue. Hewitt v. Helms, ___ U.S. ____, 103 S.Ct. 864 (1983). Upon remand to it,

the Court of Appeals for the Third Circuit concluded that its judgment on the informant issue was not affected by the Supreme Court's mandate. In short, the Third Circuit's findings and decision regarding the process due plaintiff Helms, when, on January 22, 1979, the Hearing Committee found him guilty of committing a Class I misconduct on the strength of Lt. Kyler's hearsay account of an unidentified informant's uncorroborated story, remains the law in this circuit.

In recognition of that fact, a brief summary of the Third Circuit's rationale and conclusions is in order. It is uncontested that, although he had a notarized statement of the informant in his possession, when Kyler appeared before the Committee, he neither presented to them, nor did they seek, any factual indicia of the reliability or

credibility of the informant. The Court of Appeals found that this lack of support and corroboration ran counter to the teachings of Wolff v. McDonnell, 418 U.S. 539 (1974). According to the Third Circuit, although Wolff stated that within the closely controlled and unique environment of prison society, confrontation and cross-examination of adverse witnesses are not required, it also clearly pointed out that a balance, "a mutual accommodation between institutional needs and objectives and the provisions of the constitution that are of general application" must be achieved. Wolff at 556. Wolff left the achievement of that balance, that accommodation, "to the sound discretion of the officials of state prisons." Id. at 569. The Third Circuit found that the Wolff court, while generally deferring

to the discretion of the prison officials, expected, at a minimum, that no prison hearing committee would make a decision affecting the due process rights of an inmate without first conducting "a genuine, even if single, fact finding hearing and not a charade." Helms v. Hewitt, 655 F.2d 487, 502 (3d Cir. 1981). The Third Circuit held that Helms' conviction on a misconduct charge, when the only evidence offered against him was a hearsay recital by the charging officer of an uncorroborated report from an unidentified informant, was exactly the kind of arbitrary determination prohibited by Wolff. This decision by the Third Circuit, arising from a convincing and reasonable interpretation, explication and clarification of Wolff, has set the stage for the motions presently before this court.

This court has been directed by the Third Circuit to grant and enter summary judgment for plaintiff Helms unless it finds that the defendants acted reasonably in light of existing law and are therefore protected by a qualified immunity. Harlow v. Fitzgerald, 457 U.S. 800 (1982); Procunier v. Navarette, 434 U.S. 555 (1978). It is this issue and only this issue which needs to be discussed and decided here.[1]

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[1] Only if the court should find that the qualified immunity cannot be utilized under the acts of this case, will it be required to consider the arguments concerning which of the defendants have been sufficiently implicated as having caused the deprivation of due process and what, if any, damages are due.

Discussion

The standard for evaluating a claim of qualified immunity is not in dispute among the parties here. Qualified or "good faith" immunity is an affirmative defense which must be pleaded by the defendant official. Gomez v. Toledo, 446 U.S. 635 (1980). (Defendants met this requirement by their answer of November 16, 1979 (Document #20) and in their brief in support of their cross motion for summary judgment filed on May 27, 1980 at pages 10-12 (Document #38).) The objective element of this immunity involves a presumptive knowledge of and respect for "basic unquestioned constitutional rights." Wood v. Strickland, 420 U.S. 308, 322 (1975). It is this presumption which the defendants must overcome. The subjective element of qualified immunity

(that of "malice") has never been an issue in this litigation. In fact, both parties seem to have demonstrated prescience regarding the Harlow decision of 1982. All the parties to this action agree with Harlow and Procunier that "government officials are shielded from liability for civil damages insofar as their conduct does not violate clearly established constitutional rights of which a reasonable person would have known." Harlow at 818 (emphasis added). What the parties cannot agree on is the state of the law regarding the pertinent issue on January 22, 1979. (January 22 is the date the hearing committee found Helms guilty of committing a Class I misconduct on the strength of Lt. Kyler's hearsay rendition of an unidentified informant's uncorroborated story.) It is also a generally accepted fact that "if the law at the time in

question was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." Id.

In response to the Third Circuit's opinion in Helms v. Hewitt, 655 F.2d 487 (3d Cir. 1981), each of the parties filed briefs and other documents which set forth its version of the status and clarity of the pertinent legal principles on or before January 22, 1979. Plaintiff Helms tells the court that Wolff itself was clear on the pertinent legal issue. Helms further contends that the Third Circuit's reading of the Wolff rights and protections was nothing more than the kind of reading and interpretation which the

prison officials, with the aid of their supporting counsel, could have and should have done. The plaintiff also refers this court to two cases which predate the Third Circuit's extension and elucidation of Wolff but support its findings. He cites Bartholomew v. Reed, 477 F.Supp. 223 (D.Ore. 1979) and Finney v. Mabry, 455 F.Supp. 756 (E.D. Ark. 1978). For example, the Finney case states:

> [T]he evidence in this case shows that it is not rare for a disciplinary charge to be adjudicated solely on the basis of an investigating officer's statement of what some unnamed informant, identified as such, told him. While it would not be an unusual or unreasonable rule that a prisoner charged with disciplinary rule infraction not be advised of an informant's identity, here we

have prosecutions of prisoners on the basis of informant information where the committee itself has before it neither the identity of the informer nor any direct statement of the informer. The court is convinced from all the testimony that this situation invites, and has in fact permitted, correctional officers and inmates to obtain disciplinary sanctions against inmates on the basis of fabricated charges. Finney at 765.

. . .

The most difficult problem in this case is presented by virtue of the frequent (and officially sanctioned) reliance by the disciplinary committee on secondary "reports" of rule violations, with no primary evidence of guilt of any sort, in the form of witness statements, oral or written, or physical evidence, being brought before the committee.

> The committee cannot rationally determine guilt in such instances except by a blind acceptance of the "officer's statement," which is exactly what the typical case involves, according to the testimony of a past committee member and chairman. When the charging officer is not a witness to the infraction, such an "adjudication," in view of the realities of the prison environment, necessarily is so fraught with the risk of error that it can only be considered arbitrary. The effect is to simply delegate the decision-making to the investigating officer. Id. at 768-769.

. . .

> In Wolff, although this question did not arise, the court held that confrontation and cross-examination in disciplinary hearings were not constitutionally required, due to the hazards to institutional interests, "and that adequate bases for decision in prison disciplinary cases can be arrived at without

> cross-examination." 418 U.S. at 568, 94 S.Ct. at 2980. The "adequate bases" that the Supreme Court was relying on can only mean that normal process of consideration by the committee of evidence, which this Court holds must at least be in the form of witnesses' statements, written or oral, presented to the committee for its consideration. Id. at 769.

There are two problems with these cases insofar as they are used to prove the status and clarity of the law as it should reasonably have been known by the defendants on or before January 22, 1978. First, the Bartholomew case postdates the hearing committee's decision and actions of January 22, 1979. Second, although Finney was published in time to have been known, read and considered by the committee, the defendants cannot be

fairly required to stay abreast of district court case law all across the country. Raffone v. Robinson, 607 F.2d 1058, 1062 (2d Cir. 1979).

Plaintiff also puts much emphasis on Murphy v. Fenton, 464 F.Supp. 53 (M.D. Pa. 1979), a carefully drafted decision by Chief Judge Nealon of the Middle District of Pennsylvania. In that opinion, Chief Judge Nealon ruled that "there must be a sufficient basis on the record to support the finding by prison officials that the unidentified informant was reliable...." Murphy at 56. While it is unarguable that this case supports the theory that Wolff set at least one of the standards recognized and explicated by the Third Circuit in Helms v. Hewitt in 1981, it is also unarguable that this opinion was not

published and not generally and readily available before the Board acted on January 22, 1979. Defendants should not be charged with notice of unpublished opinions. Ward v. Johnson, 690 F.2d 1098, 1112 (4th Cir. 1982). While it may be argued that prison officials and their counsel should be obligated to stay abreast of decisions of this sort within their state even when unpublished, this argument loses its strength when one considers that Murphy dealt with the federal prison system and not that of the Commonwealth. Unless this court is to turn its back on the realities of publication dates and unless it is to require defendants here to have ferreted out cases from each and every district court no matter how remote, it cannot reasonably hold that Finney, Murphy and Bartholomew clarified and

clearly established the law regarding due process rights and the use of hearsay recitals of an uncorroborated report of an unidentified informant whose reliability had never been established.

In a further attempt to support his argument that the law was clear and established, plaintiff also cites to Gomes v. Travisono, 510 F.2d 537 (1st Cir. 1974) which was cited to in Helms, 655 F.2d at 502. The language of Gomes is clear:

> If any of the facts establishing a board determination are derived from an unidentified informant: (1) the record must contain some underlying factual information from which the Board can reasonably conclude that the information was credible or his information reliable;

> (2) the record must contain the informant's statement in language that is factual rather than conclusionary and must establish by its specificity that the informant spoke with personal knowledge of the matters contained in such statement. Gomes at 540.

Note, however, that this language is taken from section IV of the Morris rules. The Morris rules were promulgated under a consent decree issued in Morris v. Travisono, 310 F.Supp. 857, 871-874 (D. R.I. 1970) and were adopted as law by Rhode Island. The problem with accepting the Gomes language as an expression of clearly established rights of constitutional dimension is that the same circuit court, in a subsequent opinion, (McLaughlin v. Hall, 520 F.2d 382 (1st Cir. 1975)) read Wolff's ruling differently. McLaughlin emphasized that

the development of specific procedural requirements beyond those specifically enumerated in Wolff must be left to the sound discretion of corrections authorities (McLaughlin at 385) and distinguished the Morris rules as separate and distinct from any purported constitutional imperatives. Therefore, it seems safe to say that the Gomes pronouncement does not prove that the law pertinent to these motions was clearly established, and as a result, Gomes cannot be used to divest defendants of their qualified immunity. It is also worth noting that McLaughlin, decided after Gomes and Morris, is one of the cases cited by the Third Circuit in Helms as having interpreted Wolff less expansively than the Rosenn panel. Helms at 501.

In light of the distinguishable and discountable status of Murphy, Bartholomew, Finney and Gomes, it seems clear that if this court is going to find support for plaintiff's argument that the law was clearly established, it would have to find it in Wolff itself. It short, this court would have to find, as the Third Circuit did, that Wolff's language and rationale clearly intended and clearly pointed to this result. Judge Rosenn, writing for the Third Circuit panel in Helms v. Hewitt, 655 F.2d 487 (3d Cir. 1981), found that Wolff teaches [that in the closely controlled environment inside prison walls, disciplinary procedures must represent a "mutual accommodation between institutional needs and objectives and the provisions of the constitution that are of general

application." (citations omitted) In striking that balance, the Court concluded that confrontation and cross examination of adverse witnesses were not required, because it believed that "adequate bases for decision" could be established through the use of other procedures. (citations omitted) Development of these procedures, the Court held, should be left "to the sound discretion of the officials of state prisons." Id. at 569; Helms at 501. (citations omitted)] Judge Rosenn also expressed the panel's belief that "Wolff intended a genuine, even if single, fact finding hearing and not a charade." Helms at 502. Additionally, Judge Rosenn pointed to the fact that:

> Wolff abjures arbitrary determinations. It therefore commands "a written statement by the factfinder as to the evidence relied on and

> reasons" for the disciplinary action. If this statement is intended to withstand scrutiny and win respect for prison disciplinary procedures, it must disclose more than a mere "reliance on speculation and facts not in the record." (citations omitted) Id.

After a close review of the facts, the Third Circuit panel determined that the hearing committee's determination of guilt on the basis of such a record (no primary evidence, no corroboration of the informant's story and no indicia of the informant's reliability) was totally unacceptable and did not fulfill Wolff's perception of "mutual accommodation between institutional needs and objections" and the basic constitutional requirements of due process. Wolff at 556.

While this court readily accepts the logical explication and elucidation of Wolff set forth by the Third Circuit

in its opinion of June 1981, and while this court agrees that the Third Circuit has done no more than logically explicate the broad and general declarations of basic due process rights and protections identified in Wolff, we must not forget the standard that is to be applied in official immunity claims. (Harlow and Procunier both allow immunity from civil damages when the conduct of the officials does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.)

It is interesting to note that none of the language excerpted from Wolff and utilized by the Third Circuit specifically and directly expresses the rights, duties and obligations found

therein by the Third Circuit panel. In fact, the Third Circuit had to intuit, extrapolate and employ its finely honed talents of analysis to arrive at its admittedly clear and convincing position.

We must also recognize, as did the Third Circuit panel itself, that various other circuits and legal commentators have read (and continue to read) Wolff to require almost complete deference to the judgment of prison officials on the need, if any, for administrative inquiry into the credibility and reliability of an informant. (See Helms v. Hewitt, 655 F.2d at 501 for citations to the First, Sixth and Eighth Circuit opinions.) Certainly, this recognition of disparate and even contradictory interpretations of Wolff by judicial panels with decades of experience at writing, analyzing and interpreting

legal decisions is proof in and of itself of the unclear and unsettled state of the law on this issue.

It should also be noted that this Court has seen nothing in the record to indicate that the prison officials were being obstructionist or recalcitrant or that they were acting in an ostrichlike manner and obstinately refusing to accept and implement the "clearly expressed" mandates of Wolff. It is true that the defendants did not exercise the wisdom, foresight and interpretive skills of the Rosenn panel. It is also true, however, that on or before January 22, 1979, the law on the instant issue was not so clear and settled that these defendants should be deprived of the qualified immunity they now seek.

In sum, this court finds that while the Third Circuit's clearly written and convincingly reasoned opinion of June 1981 has certainly changed the complexion of due process considerations in the prison environment prospectively (at least in this circuit), the status of the law on or before January 22, 1979 was not so clear and well established that the defendants' actions must be held to fall outside the protections of their qualified immunity. In light of these findings, this court will deny plaintiff's motion for summary judgment and grant defendants' motion for summary judgment.

/s/

Sylvia H. Rambo
United States District Judge

Date: February 3, 1984

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

AARON HELMS, Plaintiff	:	
	:	Civil Action
	:	No. 79-0950
v.	:	
LOWELL D. HEWITT, et al.,	:	
Defendants	:	

O R D E R

Pursuant to the reasons expressed in the accompanying memorandum, IT IS HEREBY ORDERED THAT:

1. Plaintiff's motion for summary judgment is denied;

2. Defendants' motion for summary judgment is granted;

3. The Clerk of the Court is directed to enter judgment for the defendants and close the file on this case.

/s/

Sylvia H. Rambo
United States District Judge

Date: February 3, 1984

IN THE UNITED STATES DISTRICT
COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

AARON HELMS,	:	Civil No. 79-950
Plaintiff	:	
	:	
v.	:	
LOWELL D. HEWITT,	:	
et al.	:	
Defendants	:	(JUDGE RAMBO)

PLAINTIFF'S PETITION
FOR ATTORNEYS FEES

Pursuant to 42 U.S.C. § 1988, the plaintiff hereby petitions this Court for attorneys fees, assigning the following reasons therefore:

1. Plaintiff is a prevailing party in this case and otherwise entitled to attorneys fees.

2. The Affidavit of plaintiff's counsel is attached to this Petition, as well as a Fee Schedule showing time and work performed.

WHEREFORE, plaintiff prays that he be awarded attorneys fees in this matter at the rate of $85.00 per hour and that a multiplier also be assessed.

/S/
Richard G. Fishman, Esq.
Keystone Legal Services
477 E. Beaver Avenue
Suite 230-Unico Bldg.
State College, PA 16801
(814) 238-4958

/S/
John M. Humphrey, Esq.
Murphy, Mussina, Harris, Travis,
Rieder & Humphrey
161 West Third Street
P.O. Box 215
Williamsport, PA 17703
(717) 323-8711

IN THE UNITED STATES DISTRICT
COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

AARON HELMS,	:	Civil No. 79-950
Plaintiff	:	
	:	
v.	:	
LOWELL D. HEWITT,	:	
et al.	:	
Defendants	:	(JUDGE RAMBO)

AFFIDAVIT

I, Richard G. Fishman, Esquire, being duly sworn according to law, depose and state based on my own personal knowledge that the following is true and correct:

I was admitted to practice law in the State of Pennsylvania in October of 1972 and have been practicing law since that date. I am admitted to the bar of the Supreme Court of the United States, the United States Court of Appeals for the Third and Fourth Circuits and the United States District

Court for the Middle District of Pennsylvania. Due to the location of my present employment, I am on inactive status from the United States District Court for the District of Maryland and the United States District Court for the Eastern District of Pennsylvania.

I have been specializing in prison law since 1973 and was engaged in prison work full time during the period March of 1977 through September of 1982. While I am still engaged in prison work, I now have a general legal services practice involving a variety of legal problems. I am also a Co-Director of Keystone Legal Services, Inc., my present employer. Keystone operates by a Management Committee similar to a group of managing partners operating a private law firm. There is no Executive

Director of the program. In my position, I am responsible for administration and supervision of other attorneys in the State College office as well as the Keystone Legal Services office in Clearfield, Pennsylvania.

From March of 1977 until July of 1978, I was chief attorney of the prison project of the Legal Aid, Inc. of Baltimore, Maryland. In that capacity, I engaged in litigation and supervised two other attorneys, two paralegals, a law student and a secretary in representing prisoners in state and federal courts and before administrative and legislative bodies. From July of 1978 until September of 1982, I headed the prison of Keystone Legal Services, Inc. and during that period of time supervised two other attorneys and a practicum student from Penn State University

in the provision of legal services for inmates.

My litigation experience includes arguing prison cases before the Pennsylvania and United States Supreme Courts. I have orally argued six (6) times in the United States Court of Appeals for the Third Circuit and twice (2) in the United States Court of Appeals for the Fourth Circuit on prison matters. I have also orally argued in the lower appellate courts in Pennsylvania and Maryland.

I have published an article concerning prisoner's rights and the labor movement and an article of a nonlegal nature concerning prison conditions in general. Last year I wrote a guest editorial for the Centre Daily Times in State College, Pennsylvania concerning prison overcrowding. I wrote a Self-Help Manual for Defense of Miscon-

ducts in Pennsylvania State Correctional Institutions which has been distributed in the past to inmates in the various prisons around the state and I have edited self-help manuals for consensual and three year separation divorces in Pennsylvania which were also geared for inmates to do their own divorce. In 1982, 1983, 1984, I have been a guest lecturer in corrections at classes taught in criminal justice at the Pennsylvania State University. In 1981 I taught at a seminar for legal services' attorneys concerning their training in federal practice and procedure. In 1975 and 1976 I taught legal research to inmates at the Delaware County Prison in Thornton, Pennsylvania.

My legal education includes a J.D. in 1972 from the Temple University School of Law and an L.L.M. in Urban

Affairs in 1973 from the University of Missouri-Kansas City School of Law.

In terms of the risks involved in Keystone Legal Services engaging in this and other prison litigation, it must be understood that we are not mandated by our funding sources to represent inmates in prison conditions and practices litigation. However, as a matter of priority at the time this litigation was filed, we decided to do prison work because our program had two state correctional institutions in our service area, Huntingdon with a population of over 1,500 inmates and Rockview with a population of over 1,200 inmates, as of 1982 and we were receiving many complaints about conditions. Due to the nature of this type of litigation and the logistics in representing prisoners, time spent in prison cases and just answering letters and

interviewing prison clients substantially detracts from the resources of our program in being able to provide services to clients who walk in off the street. In addition, as of September 1980, Keystone Legal Services had its largest staff of fifteen (15) attorneys and three (3) paralegals, with a budget of $605,297.00. At present we are operating on a budget of $448,229.00 with a staff of only eight (8) attorneys and one (1) paralegal. These funding cuts have also necessitated our program going from three (3) attorneys working full time on prison matters to just one (1) attorney, the undersigned, doing prison work part-time.

/S/

Richard G. Fishman, Esq.

Sworn to and subscribed before me
this 22nd day of October, 1984.

Sandra K. Rogers /S/
Notary Public

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF JUSTICE
BUREAU OF CORRECTION

BC-ADM 801 Administrative Directive
(Rev. 10/78)

Subject:

Institutional Disciplinary and Restricted Housing Procedure

I. SCOPE AND PURPOSE

Institutional life shall be governed by standards of behavior designed to promote correctional objectives and to maintain the general welfare of the institutional community. The laws of this Commonwealth and the rules and regulations of the Bureau of Correction and of the institution are a part of the standards of behavior governing each institution.

Behavior which deviates from such standards shall be handled by staff in the manner prescribed by this directive. Such behavior shall be evaluated within the context of the total treatment plan of the individuals, the effect of such behavior upon others and its consequences for the good order of the entire institution.

The methods used by staff shall be for the purpose of bringing about voluntary compliance with the standards prescribed. Sanctions shall be imposed only when necessary and in the degree necessary to regulate the unacceptable behavior.

II. STANDARDS OF BEHAVIOR

A. Rules and regulations which define expectations and prohibitions and which apply throughout the Bureau shall be established in writing in the form of Administrative Directives issued jointly by the Attorney General and the Commissioner of Correction. Rules and regulations pertinent to each institution which comport with the Administrative Directives shall be established in writing by the respective Superintendents upon approval of the Commissioner of Correction. The above rules and regulations shall be as relevant to the norms of the general society as the special problems of group life in the institution shall permit. They shall be published by the distribution of individual copies to each staff member and to each inmate and posted on bulletin boards. They shall be fully explained in inmate orientation sessions, staff meetings and other training.

B. Behavior which constitutes any of the following misconducts shall be deemed a violation of rules and regulations in all correctional facilities. Such state misconduct, classified as Class I or Class 2 in accordance with the following list, shall subject the inmate to the procedures of this directive.

(a) Class 1 Misconducts

1. Murder - Manslaughter
2. Escape
3. Possession of or Introduction of Contraband or Implements of Escape
4. Carrying a Deadly Weapon
5. Arson
6. Robbery
7. Burglary
8. Theft
9. Tampering with, Destroying or Damaging Property
10. Sodomy
11. Indecent Exposure
12. Rioting or Inciting to Riot
13. Conspiracy to Escape, Riot or Disrupt Normal Institution Routine that Could Result in Bodily Injury to Personnel or Inmates
14. Bribery of an Employee
15. Threatening an Employee or Inmate with Bodily Harm or Injury

16. Assaults and Fighting
17. Adulteration of any Food or Drink
18. Refusing to Obey an Order
19. Possession of or Use of Dangerous or Controlled Substances
20. Refusing to Work
21. Violating a Condition of Pre-release Program
22. Breaking Restriction or Quarantine
23. Intoxication
24. Making Fermented Beverages or Possession of Materials to Manufacture Fermented Beverages
25. Lying to an Employee
26. Conducting a Gambling Operation
27. Unauthorized Use of Mail or Telephone
28. Conduct with a Visitor in Violation of Posted Regulations
29. Presence in an Unauthorized Area
30. Loaning any Property for Profit
31. Insolence or Disrespect toward a Staff Member
32. Possession of Stolen Property
33. Violations of Administrative Directives not Specifically Enumerated
34. Other Felonies and Misdemeanors not Specifically Enumerated
35. Repeated Violations of Class 2 Misconducts

(b) Class 2 Misconducts

1. Body Punching, Horseplay
2. Taking Unauthorized Food from Dining Room, Kitchen or Officer's Mess
3. Possession of Unauthorized Clothing
4. Tattooing and other Forms of Self-Mutilation
5. Failure to Report to Work or Unexcused Absence from Work
6. Loaning or Borrowing Property except Legal Material
7. Failure to Follow Safety and Sanitation Regulations Regarding his Person, Quarters and Equipment
8. Failure to Stand Count or Interference with Count
9. Smoking where Prohibited
10. Any Violation of Rule or Regulation Contained in the Inmate Handbook not Specifically Enumerated Above

C. Attempts to commit any of the foregoing misconducts where the intent to do the prescribed act is clear and the inmate has taken substantial steps toward its completion, may be charged under the applicable misconduct.

PROCEDURES

A. Behavior problems which may be resolved by immediate counseling, warning or verbal reprimand shall be dealt with accordingly by the staff person involved. More serious violations shall be the subject of a Misconduct Report.

B. The Misconduct Report, a four-sheet snap set, shall in each case be distributed as follows: one copy shall be given directly to the inmate, whenever possible, by the staff member who wrote the Misconduct Report after approval by the ranking Correctional Officer on duty that the Misconduct Report has been properly written. No action shall be taken on the Misconduct Report unless this is done. The inmate will receive the copy as soon as possible and if placed in pre-hearing confinement, no later than three hours after such confinement begins. One copy shall be retained by the staff person who wrote the misconduct. A third copy shall be forwarded to the Deputy Superintendent for Treatment Services. The original shall be forwarded to the Chairman of the Hearing Committee and, following disposition, will be retained in the JBC-15 (records jacket).

C. Misconducts shall be referred to the Hearing Committee which shall be composed of the Chairman, who shall be the permanent member (Major or Captain of the Guard), a Casework Supervisor and a School or Vocational Supervisor, both of whom may rotate periodically. In the absence or lack of any of the foregoing members, the Superintendent shall designate an appropriate substitute. The Hearing Committee shall not include any participants in the incident or incidents from which the charges arise.

D. The procedure for handling misconducts shall be as follows:

1. The inmate shall be informed in writing of the charge and given a specific date for a hearing which shall be held not less than 24 hours after receipt of this notice but within six days.

2. The inmate shall be permitted assistance in presenting his case from either any staff member or any inmate in general population status, provided that such staff member or inmate is willing to serve in such an advisory capacity.

3. The inmate shall be permitted to meet with the person he chooses an appropriate length of time before the hearing.

4. The inmate shall be permitted to call witnesses at the hearing. They shall be regulated by the Chairman of the Hearing Committee based on their relevance to the case. No inmate can be forced to be a witness against his will.

E. The Hearing Committee shall conduct the hearing as follows:

1. The charge and alleged facts in support of the charge shall be read and fully explained by the Chairman. The staff member writing the misconduct may be present if he wishes and may call witnesses to support his claim. However, in cases of factual conflict, when the Hearing Committee deems it necessary to resolve the dispute, they shall compel the staff member's presence and may continue the hearing until he can be present.

2. The inmate shall be permitted to admit or deny the charges and to give his version which shall be recorded on the misconduct form by a member of the Hearing Committee.

3. The inmate may present information available to him and to others, with help from whomever he has chosen to assist him.

4. The committee members may interrogate the person making the report, the inmate and others as necessary.

5. The inmate may question the staff member charging him if the staff member is present and other witnesses who testified against him. The extent of the questioning shall be controlled by the Chairman of the Hearing Committee as considerations of relevancy, security and other valid considerations dictate.

6. A written summary of the hearing will be prepared which will include the facts relied upon by the Hearing Committee to reach its decision and the reasons for the decision.

A copy of the written summary will be given to the inmate. The inmate may if he wishes submit a concise summary of the hearing which summary shall be made a permanent part of the file.

7. After the decision is reached by the Committee, the inmate charged shall be called before the Committee to hear the decision and to be advised of its rationale.

8. A committee decision shall be based upon a preponderance of the evidence. Before action other than dismissal of the charges is taken, the Committee must be satisfied that, more likely than not, the inmate has committed a misconduct.

9. The inmate shall be informed that the decision of the Hearing Committee will be formally reviewed by the Program Review Committee upon the inmate's request. The inmate shall indicate on the Misconduct Report that he has been advised of his right to request a formal review

and so attest by his signature; if the inmate refuses to sign two witnesses shall sign to attest that the inmate was advised that he has fifteen days to submit a written request for a formal review.

F. The Hearing Committee may take the following actions:

1. In cases where the violation is proved and constitutes a Class 2 Misconduct:

a. Reprimand or recommend counseling.

b. Suspend privileges for up to fifteen days.

c. Assess fair repayment for property willfully destroyed.

d. Change cell assignment; excluding placement in Administrative Custody or Disciplinary custody.

e. Submit a recommendation for transfer to another institution to the Program Review Committee.

2. In cases where the violation is proved and constitutes a Class 1 Misconduct:

   a. Reduce classification to Class 2 Misconduct and take any action permitted above.

   b. Take any action permitted for Class 2 Misconducts above

   c. Change cell assignment; including placement in Close or Maximum Disciplinary Custody. Such placement will be reviewed weekly by the Program Review Committee as provided for in this Directive and will have a specified maximum duration for each misconduct not to exceed six months.

   d. Suspend privileges for specified period of time.

   e. Reclassify custody or program status.

G. Program Review Committee

1. The Program Review Committee shall be composed of the Deputy Superintendent for Operations, the Deputy Superintendent for Treatment Services and the Classification and Treatment Supervisor. In the absence or lack of any of the foregoing members, the Superintendent shall designate an appropriate substitute.

2. The inmate shall be entitled to have any decision of the Hearing Committee reviewed by the Program Review Committee at his request.

3. The Program Review Committee shall review at one half of the sentence served or weekly, whichever is the lesser, in those cases of inmates detained in Administrative Custody or Disciplinary Custody and shall decide whether continued custody in those units is appropriate and necessary in each case. This decision will be based upon a review of the counselor's notes and recommendations, additional

entries made on the inmate's record regarding his attitude and actions since placement in the restricted housing or since the last weekly review as well as the misconduct which was the basis of the placement for those cases in Disciplinary Custody.

4. The Program Review Committee, as a Committee, shall interview in person at least once every thirty days, those inmates detained in Administrative Custody or Disciplinary Custody. The determination of whether continued confinement is warranted will be based upon a review of the counselor's notes and recommendations, psychological and psychiatric reports when available, recommendations by other staff and their written observations regarding his attitude and actions and his attitude and actions during the interview. If the inmate is in Disciplinary Custody, the gravity of the misconduct must also be considered. When the Program Review Committee determines that continued confinement is warranted,

the inmate shall be given a written statement of the decision and its rationale. In cases of inmates detained in this status for more than thirty days, it shall be reported to the Commissioner of Correction by the Superintendent with his comments as well as those of the Program Review Committee and the rationale for such status and particular programs prescribed shall be stated. All inmates continuously confined in Administrative and Disciplinary Custody for a period of one year shall be given thorough annual psychological and psychiatric examination during this confinement.

5. The Program Review Committee, in releasing an inmate from Disciplinary Custody, must determine whether the inmate is a threat to other inmates, to staff or to himself or poses a threat of escape and all available records on the inmate shall be reviewed and considered to make this decision. In cases where such a determination is made the Program Review Committee may assign the inmate to either

Close or Maximum Administrative Custody in cases where the inmate was released from Maximum Disciplinary Custody or to Close Administrative Custody where the inmate was released from Close Disciplinary Custody. This determination will be made in writing and a copy will be provided to the inmate.

H. Scheduling and procedure for conducting appeal hearings by the Program Review Committee:

1. Upon receiving a request from the inmate for review of Hearing Committee's decision, the Program Review Committee shall notify the inmate and the chairman of the Hearing Committee of the time and date set for the review. The inmate may be excluded at the discretion of the Program Review Committee.

2. The inmate, with assistance if desired, shall present his objections to the decision of the Hearing Committee. These may be submitted in written form.

3. The Chairman of the Hearing Committee shall present the reasons for the decision.

4. The Program Review Committee may question both the inmate and the Chairman of the Hearing Committee regarding the facts and the rationale for the decision.

5. The Program Review Committee shall take the matter under advisement and promptly render the decision, together with the rationale, to the inmate and the Chairman of the Hearing Committee.

6. The inmate shall be given a written statement of the decision and its rationale.

7. All decisions of the Program Review Committee shall be reviewed by the Superintendent for his sustaining the decision or amending or reversing the decision in favor of the inmate.

IV. BEHAVIOR CONTROL AND CONFINEMENT

A. General

1. As the result of a general institutional disturbance or an incident which could result in the loss of control, all inmates may be confined to their own cells upon approval of the officer in charge of the institution. This action may be taken pending the restoration of order and a determination that normal institutional operations can be safely resumed.

B. Individual

1. An inmate who has allegedly committed a Class I Misconduct may be placed in Close or Maximum Administrative Custody upon approval of the officer in charge of the institution not routinely but based upon his assessment of the situation and the need for control pending application of procedures under paragraph III.

2. Depending upon the situation and the need for control, an inmate who has allegedly committed a Class 2 Misconduct may be removed immediately from his job,

restricted in activities or confined to his own cell upon approval of the officer in charge of the institution not routinely but based upon his assessment of the situation and the need for control pending application of procedures under paragraph III. If an inmate has been confined to his cell pending a hearing he will continue to enjoy use of his personal property such as his own television, radio, etc. except when the alleged misconduct involves the misuse of the item of personal property.

3. An inmate may be temporarily confined to either of the above units in an investigative status upon approval of the officer in charge of the institution where it has been determined there is a threat of a serious disturbance or a serious threat to the individual or others. The inmate shall be notified in writing as soon as possible that he is under investigation and that he will receive a hearing if any disciplinary action is being considered after the investigation is completed. An investigation shall begin immediately to determine whether or not a behavior violation has

occurred. If no behavior violation has occurred, the inmate must be released as soon as the reason for the security concern has abated but in all cases within ten (10) days.

4. An inmate who requests self-confinement may be placed in Close or Maximum Administrative Custody upon approval of the officer in charge of the institution pending review by the Program Review Committee. The Program Review Committee shall document the request by the inmate as well as the reasons for the request and shall determine whether Close or Maximum Administrative Custody is warranted by a review of the reasons and whether continuing confinement is justified or whether a transfer should be recommended.

V. RESTRICTED HOUSING CATEGORIES

The Bureau of Correction for purposes of this Administrative Directive shall recognize the following restricted housing categories for inmates within state correctional institutions.

A. Administrative Custody - for inmates requiring closer supervision or protection than is provided in general population and for temporary assignment of inmates pending further classification. Maximum Custody involves housing in the most secure facilities available in the institution and includes the most intensive scrutiny of all matters pertaining to security and the most restrictive regulation on inmate mobility. Close Custody involves housing in more secure facilities than those used for general population and restricted mobility. The degree of security and restriction of mobility is less than the degree present in maximum custody. Maximum or Close Custody may be designated based on the intensity of Supervision and control required.

B. Disciplinary Custody - for inmates found by the Hearing Committee to have committed Class 1 Misconducts. Maximum Custody

involves housing in the most secure facilities available in the institution and includes the most intensive scrutiny of all matters pertaining to security and the most restrictive regulation of inmate mobility. Close Custody involves housing in more secure facilities than those used for general population and restricted mobility. The degree of security and restriction of mobility is less than the degree present in maximum custody. Maximum or Close Custody may be designated based on the intensity of the supervision and control required as well as the nature and the particulars of the offense committed.

VI. CARE AND TREATMENT

A. Administrative Custody housing shall be designated as Close and Maximum and will be specified groups of cells in a designated section or sections of the institution as the physical plant permits.

1. The purpose of placing an inmate in this unit shall be to maintain the safety of the institution by segregating an individual who poses a threat to other inmates, to staff or to himself, poses an escape risk or needs protection from other inmates. The decision to place an inmate in this custody must comply with III. G.4., IV. B.1., IV. B.3. or IV. B.4. Determination of whether Close or Maximum Administrative Custody is necessary will be made by the Program Review Committee.

2. The inmates therein shall have all the rights and privileges accorded to the general population except for freedom to move about the institution, freedom to engage in programs with the general population, the use of civilian clothing and the use of items specifically found by the Program Review Committee to be a security hazard. The use of personal radios and televisions

may be permitted with the express approval of the Program Review Committee. All other personal property which is permitted in general population will be permitted in Administrative Custody.

3. The inmate requesting the use of an item or to participate in a program permitted in general population not expressly excluded above shall initiate such a request through the request slip process to the Program Review Committee who shall respond within one week.

4. The Program Review Committee may permit a limited release program from Close Administrative Custody as a gradual process to return to general population status.

B. Disciplinary Custody housing shall be designated as Close and Maximum and will be specific groups of cells in a designated section or sections of the institution as the physical plant permits. The initial determination of whether Close or Maximum Disciplinary Custody is necessary will be determined by the Hearing Committee to be later reviewed on a weekly basis by the Program Review Committee as outlined in III.

1. The purpose of placing an inmate in this unit shall be to supervise and control serious disciplinary problems.

2. Inmates confined therein shall not be permitted freedom to move about the institution or to engage in programs with the general population. Inmates in this confinement will be permitted those items or use of those items necessary to maintain an adequate level of personal hygiene as well as a reasonable amount of personal legal materials and correspondence. Inmates in this unit will also be permitted to visit with their approved visitors consistent with institutional and Bureau regulations, to correspond consistent with Bureau Directives and will be issued those items not already possessed by the inmate necessary to maintain personal hygiene, to correspond and prepare personal legal documents; also three cigarettes or their equivalent per day if requested. Any privilege may be curtailed at the express decision of the Hearing Committee after a Hearing.

C. Inmates in categories A and B above shall receive interviews at least weekly by the institution's professional treatment

staff. The Program Review Committee shall release an inmate from Administrative Custody or Disciplinary Custody as soon as appropriate.

D. All misconducts committed while confined in these categories must be written up and disposed of by the Hearing Committee procedure.

E. A shift commander, chaplain and a medical doctor shall visit inmates in Maximum Administrative Custody and Maximum Disciplinary Custody each day and such visits shall be recorded in the logs.

F. Every thirty days the Superintendent shall personally review the case of each inmate separated from the general population for thirty days or more. He shall maintain a written report of his findings in each such case and together with a copy of the Program Review Committee's report shall submit them to the Commissioner monthly.

VII. SUSPENSION OF DIRECTIVE

In an extended emergency situation or extended disruption of normal institutional routine, any provision or section of this directive may be

suspended by the Superintendent for a specific period of time with the approval of the Commissioner of Correction.

The foregoing has been approved by the Department of Justice, Bureau of Correction, and shall be effective October 1, 1978. This supersedes all previous directives on this subject and shall apply to all state correctional institutions and regional correctional facilities.

Gerald Gornish
Attorney General

William B. Robinson
Commissioner

BC-ADM 801 Administrative Directive

COMMONWEALTH
OF PENNSYLVANIA

Subject

INMATE DISCIPLINARY PROCEDURES

Bureau of Correction

I. SCOPE AND PURPOSE:

Institutional life shall be governed by standards of behavior designed to promote correctional objectives and to maintain the general welfare of the institutional community. The laws of this Commonwealth, the rules and regulations of the Bureau of Correction and of the institution are part of the standards of behavior governing each institution.

Discipline for behavior which deviates from such standards shall be handled by staff in the manner prescribed by this directive. Such behavior shall be evaluated within the context of the correctional plan of the individuals, the effect of such behavior on others and its consequences for the good order of the entire institution.

II. DEFINITIONS

For the purpose of this directive, the following definitions shall apply:

A. Administrative Custody - A housing status which provides closer supervision, control and protection than is generally provided in general population status, for non-disciplinary reasons.

B. Disciplinary Custody - A housing status, to which inmates found guilty of Class I Misconducts may be committed.

C. Hearing Committee

1. A panel composed of three (3) members, consisting of:
   (a) A Major or Captain of the Guard
   (b) A Casework Supervisor
   (c) A School or Vocational Supervisor (In the case of the Vocational Supervisor he must be a non-uniformed Supervisor.)

The Superintendent of an institution which does not employ at least three persons for any of the three categories of members, may designate management level staff members from the same phase of institution operation to serve.

2. These members shall be selected from a pool of nine persons (except the State Correctional Institution at Graterford which shall have twelve) designated by the Superintendent.

3. No member of a Hearing Committee panel shall have a direct supervisory role over any other panel member. Hearing Committee members who are closely related shall not serve on the same panel.

4. No staff member who wrote or approved the misconduct charge(s) or conducted the investigation into the charge(s) shall serve on the Hearing Committee panel which hears that misconduct.

5. There shall be only one (1) uniformed person on any hearing panel.

6. Only top-level management persons shall be chosen to sit on a Hearing Committee panel.

D. Hearing Committee Coordinator

The Hearing Committee Coordinator shall be a Casework Supervisor. The duties of the Hearing Committee Coordinator shall include, but not be limited to:

1. Scheduling of hearings,
2. Determination of relevancy of witnesses and availability at the hearing,
3. Extent of direct or cross-examination of any witnesses,
4. The reading and explanation of the charges to the charged inmate,
5. Announcing the decision and rationale of the Hearing Committee,
6. All other functions previously reserved to the Chairman of the Hearing Committee.

E. Hearing Examiner - An employee of the Bureau of Correction Central Office who assumes all of the functions of the Hearing Committee as described in this directive and other related duties.

F. In Camera - A hearing is held in camera when the hearing committee or examiner hears testimony or reviews evidence or documentation without the presence of the charged inmate.

G. Misconduct - Any behavior prohibited by Bureau of Correction Institution regulations, rules or policy. The term is also used to identify individual items listed as prohibited activities in §III.

H. Misconduct Charge - Listed in Section III of this directive

I. Misconduct Report - BC-141, Part I.

J. Program Review Committee - An panel of three members consisting of: 1. The Deputy Superintendent for Operations, 2. The Deputy Superintendent for Treatment Services, and 3. A Classification and Treatment Manager. The Superintendent may designate appropriate substitutes.

K. Restricted Housing Unit - An area or group of cells used for the purposes of inmates assigned to administrative and disciplinary custody and for the temporary housing of inmates awaiting classification or available cell space.

III. PROHIBITED ACTIVITY

Behavior which constitutes any of the following is prohibited.

A. Class I Misonduct Charges

1. Any felony, misdemeanor or summary offense.
2. Escape

3. Possession of contraband including money, implements of escape, unprescribed drugs or drugs which are prescribed, but the inmate is not authorized to possess, drug paraphernalia, poisons, intoxicants, materials used for fermentation, property of another, weapons or other items which in the hands of an inmate present a threat to self, others or to the security of the institution. When an inmate is charged under this section with possession of an item of contraband which is a weapon or item which in his hands presents a threat to others or to the security of the institution, and the item also has a legitimate use in the area discovered, credible evidence that the item has been used only for the legitimate purpose shall be considered to mitigate the misconduct to a Class II.
4. Kidnapping, taking hostage or holding any person against his will.
5. Destroying, altering, tampering with, or damaging property.
6. Wearing a disguise or mask.
7. Engaging in sexual acts with others, or sodomy.
8. Indecent exposure
9. Engaging in, or encouraging any group activity without prior approval by Superintendent or designee.
10. Disruption or interference with the security or orderly running of the institution.

11. Failure to stand count, interference with court.
12. Bribery.
13. Threatening another inmate or other person with bodily harm, or with any offense against his person, family, or property.
14. Extortion, blackmail, protection, demanding or receiving money or anything of value in return for protection against others, to avoid bodily harm, or under threat of informing.
15. Assault or fighting.
16. Adulteration of any food or drink.
17. Refusing to obey an oral or written order.
18. Refusing to work or encouraging others to refuse to work.
19. Unauthorized use of dangerous or controlled substances.
20. Violating a condition of a Pre-Release program.
21. Breaking restriction or quarantine.
22. Possession or consumption of intoxicating beverages.
23. Making fermented beverages.
24. Lying to an employee.
25. Gambling, conducting a gambling operation or possession of gambling paraphenalia.
26. Unauthorized use of mail or telephone.
27. Conduct in violation of posted regulations.
28. Presence of an unauthorized area.
29. Loaning any property for profit.
30. Using abusive or obscene language to an employee.
31. Violation of Administrative Directives not specifically eumerated above.

32. Possession or circulation of a petition.
33. Repeated Class 2 Misconducts.
34. Conspiracy to commit any Class I or Class II misconduct.
35. Failure to report presence of contraband.

B. Class II Misconduct Charges

1. Body Punching, Horseplay
2. Taking Unauthorized Food from Dining Room, Kitchen or Officer's Mess.
3. Tattooing or other Forms of Self-Mutilation.
4. Failure to Report to Work or Unexcused Absence from Work.
5. Loaning or Borrowing Property except Legal Material.
6. Failure to Follow Safety and Sanitation Regulations Regarding the Inmate's Person, Quarters or Equipment.
7. Smoking where Prohibited.
8. Possession of any item not authorized for retention or receipt by the Inmate not specifically enumerated as a Class I contraband (#3). Existence of Class I contraband-mitigating factors established as per #3.
9. Any violation of any Rule or Regulation contained in the Inmate Handbook or Institutional Supplemental not Specifically Enumerated Above.

C. An attempt to commit any of the foregoing misconducts is a misconduct of the same class as the completed offense would be.

IV. MISCONDUCT REPORTS

A. Misconduct Reports

1. Content of the Misconduct Report

The misconduct report is used to give notice to the inmate of the conduct violations, with which he has been charged and the facts upon which the charges are based. The misconduct report will be used as evidence against the inmate at the misconduct hearing.

2. Charging Staff Member

The misconduct report is used to give notice to an inmate of the misconducts with which he is charged. It shall be written by a staff member who has personal knowledge of the misconduct or by a staff member at the direction of a person who has personal knowledge of the misconduct.

3. Time of Writing of Misconduct Report

The misconduct report shall be written within a reasonable period of time after the events which constitute the misconduct.

4. Approval by Ranking Officer on Duty

Prior to service of the misconduct report on the inmate, the report shall be reviewed and approved by the Shift commander. If the Shift commander is a regular member of the hearing committee which will hear the misconduct charges, the report may be approvee by the second in command.

B. Service of Misconduct Report

1. The inmate shall be served with the misconduct report within a reasonable time after it is written.

2. If an inmate is placed in pre-hearing confinement, the misconduct report shall be delivered to the inmate within 3 hours after the time the pre-hearing confinement begins.

3. The misconduct report should, whenever possible, be delivered by someone other than the charging staff member.

4. The staff member who delivers the misconduct report shall record the date and time of delivery on the misconduct report.

C. Distribution of Additional Copies

A copy shall be retained by the staff person who wrote the misconduct. A copy shall be forwarded to the Deputy Superintendent for Treatment Services. The original shall be forwarded to the Coordinator of the Hearing Committee/Hearing Examiner.

D. Witness Request, Inmate Version and Waiver forms shall be delivered to the charged inmate with the Misconduct Report. The inmate shall fill out the Witness Request Form and return it to the block officer no later than 9:00 A.M. the next working day and waiver forms may be returned at any time prior to the misconduct hearing. The block officer shall forward the Witness Request Form to the Hearing Coordinator/Examiner. The inmate should bring the Inmate's Version Form to the hearing.

V. MISCONDUCT HEARING

A. Scheduling - The misconduct hearing shall be scheduled no less than 24 hours nor more than 6 calendar days after notice of charges is delivered. A minimum of forty-eight hours notice must be given prior to hearing on a misconduct charge which results in the revocation of pre-release status.

B. The misconduct hearing shall be conducted by a Misconduct Hearing Committee or Hearing Examiner as defined by Section II of this directive.

C. Inmate Assistance

1. The inmate shall be permitted assistance in presenting the case from any staff member or any inmate in general population status, provided that such staff member or inmate is willing to serve in such an advising capacity.

2. The inmate shall be permitted to meet with the person chosen an appropriate length of time before the hearing.

3. An inmate assistant may assist the inmate in the presentation of witnesses

or other evidence and shall have a reasonable opportunity to address the hearing committee/examiner.

D. Plea

The charges shall be read. The charged inmate shall admit or deny the charges. An inmate who refuses to plead shall be deemed to have admitted the charges. He may submit his version in writing or may orally present his version which shall be recorded on the Inmate's Version Form.

E. Witnesses

1. The Hearing Committee may require the presence of any staff member or witness.

2. Up to three relevant witnesses, who have been properly requested, shall be permitted unless the Hearing Committee Coordinator/Examiner determines that the witness is unavailable or that a countervailing security concern makes it unreasonable to produce the witness. The inmate may include in this number one staff member who witnessed the misconduct, or if no staff member witnessed the misconduct, the charging staff member.

(a) Relevance - The inmate must state on the Witness Request Form why he believes the witness is relevant.

(b) Availability.

If the inmate requests a staff member or inmate witness who is not available at the time of the hearing, the inmate may elect either to waive the six (6) day hearing requirement to permit the witness to be present or to have the witness execute a written statement under oath which will be presented in lieu of live testimony. If the inmate elects to have the witness present, the hearing will be rescheduled at the earliest practical time after the witness is available.

(c) Countervailing Security Concern

For the purpose of this section, a countervailing security concern is established when the institution presents evidence

to show that the requested witness has a demonstrated history of recent erratic, hostile and/or disruptive conduct on multiple occasions such that the presence of the witness would unduly disrupt the progress of the hearing. In the event that a requested witness who has no such history as herein described, exhibits a current state of mind such as would reasonably lead to erratic, hostile and/ or disruptive conduct at the hearing, it shall be the duty of the Hearing Committee Coordinator or Examiner to personally examine the requested witness before the hearing, to determine the suitability of presenting the witness in person at the hearing. If the Hearing Committee Coordinator/Examiner determines that it would be unsuitable to have the witness present, he may at his election either continue the hearing until the witness may

be safely produced, take a written statement from the witness, or hear the testimony of the witness out of the presence of the charged inmate. In the event that a witness exhibits erratic, hostile and/or disruptive behavior at the hearing, the witness may be removed.

3. The Hearing Committee/Examiner may at their discretion examine the charging staff member, the charged inmate or any other witness. Except in the case of testimony heard in camera as provided below, the inmate shall be permitted a reasonable opportunity to ask relevant questions of any witness who has testified against him unless the witness objects. The extent of the questioning shall be controlled by the Hearing Coordinator/Examiner.

4. Determinations of credibility shall be left to the judgment of the Hearing Committee or Examiner.

5. All testimony shall be under oath.

6. If the inmate elects to plead guilty or waive his right to a hearing, no witnesses will be required.

F. Confidential Source of Information

When the misconduct is based upon information supplied by an informant whose identity should remain confidential, the following procedure shall be employed:

1. The information given by the informant, but not the identity of the informant, shall be disclosed to the inmate during the hearing unless the institution has reason to believe that the disclosure of the information itself would disclose the identity of the informant. In the latter instance, the information shall be presented to the Hearing Committee or Examiner, in camera.

2. The reliability of the informant will be established to the Hearing Committee or Examiner by a preponderance of the evidence by showing:

   a. The informant had the ability and was in the position to observe,

b. The informant has knowledge of the subject matter of the violation, and

c. The informant has given reliable information previously or that other witnesses have corroborated some of the information supplied by the informant.

3. The inmate shall be permitted to be present during the presentation of the reliability evidence unless the institution reasonably believes that the disclosure of the information describing the reliability of the informant would present a threat to the institution's security, in which case the evidence shall be presented in camera to the Hearing Committee or Examiner.

VI. DISPOSITION OF CHARGES

A. Determination of Guilt.

1. As soon as possible after the hearing of all evidence, but within the 6 day limit, the Hearing Committee/Examiner shall determine whether the inmate is guilty of the

misconduct charges based upon a preponderance of the evidence, that it is more likely than not that the inmate committed the misconduct with which he is charged. Each vote of a Hearing Committee member shall have equal weight.

2. After the decision is reached by the Committee/ Examiner the inmate charged shall be called before the Committee/Examiner to hear the decision.

3. If the inmate is found not guilty, that fact shall be recorded in writing. The inmate shall be given a copy. No rationale for the decision is required. All record of the misconduct shall be removed from the inmate's institution file and retained in a separate institution file.

4. Two (2) of the three (3) Committee members must concur to convict an inmate of any misconduct. A record shall be made of how each member voted. This record shall be forwarded to the Program Review Committee if they

are to review the misconduct. It shall not be disclosed to the inmate. Only the vote count will be announced to the charged inmate.

5. If the inmate is found guilty, a written summary of the hearing will be prepared which will include the facts relied upon by the Hearing Committee/Examiner to reach the decision and the reasons for the decision. The summary shall also include findings of fact concerning the testimony of each witness presented. A copy of the written summary will be given to the inmate. The inmate may if he wishes submit a concise summary of the hearing which summary shall be made of a permanent part of the file. The inmate shall be informed of possible avenues of appeal. The inmate shall indicate on the Misconduct Report that he has been advised of his right to request a formal review and so attest by his signature; if the inmate refuses to sign, two witnesses shall sign to attest that the inmate was advised of the right

to request a formal review. The inmate shall be advised that he has fifteen days to submit a written request for a formal review.

B. Sanctions

1. No sanction shall be imposed for any misconduct charge, for which the inmate is found not guilty.

2. Inmates found guilty of Class I Misconduct charges may be subjected to any one or more of the following sanctions:

   a. Reduction of the classification of the misconduct to a Class 2 and any sanction permitted for Class 2 misconducts.
   b. Any sanction permitted for Class 2 misconducts without change in class of misconduct.
   c. Change of cell assignment: including placement in Disciplinary Custody in the RHU or restrictive confinement in a general population cell for a period of time not to exceed six

months for any one misconduct charge.

d. Change of program level.

3. Inmates found guilty of Class 2 misconducts may be subjected to any one or more of the following sanctions:

a. A reprimand.
b. Suspension of privileges for a specified period of time.
c. Payment of the fair value of property lost or destroyed or for expenses incurred as a result of the misconduct.
d. A change of cell assignment except placement in Administrative or Disciplinary Custody status.
e. Change, suspension or removal from job.

VII. APPEALS

A. Appeal to the PRC

1. For the purposes of the Consolidated Inmate Grievance Review Procedure, BC-ADM 804, both the decision

of the Hearing Committee/ Examiner and the appeal decision of the PRC shall be considered Initial Review Decisions

2. Any inmate who has been found guilty of a misconduct by the Hearing Committee or Examiner may appeal to the Program Review Committee. The three bases for an appeal by the inmate are:

   a. The procedures employed were contrary to law, this directive or to the ICU Consent Decree:

   b. The punishment is disproportionate to the offense; and

   c. The evidence was insufficient to support the decision.

   No appeals from a finding of not guilty are permitted.

3. All appeals shall be in writing. Only one appeal to the Program Review Committee shall be permitted in the case of each misconduct.

4. Any inmate may seek the assistance of a staff member or an inmate in the same population status in the preparation of an appeal. However, only the inmate who has been found guilty of a misconduct shall be permitted to seek review. The inmate grievant must sign the appeal.

5. The appeal shall include a brief statement of the facts relevant to the claim. The text must be legible and presented in a courteous manner. The inmate should identify any persons who may have information which could be helpful in resolving the grievance. He may also state any claims he wishes to make concerning violations of Bureau directives, regulations, the ICU Consent Decree or other law.

6. The PRC will address all issues raised by the inmate and may, at its discretion, consider any other matter relevant to the issues raised. The PRC is not required to address any issue not raised by the appellant.

It will issue a brief written statement to the inmate of the reasons for its decision.

7. The Program Review Committee shall have the power to:

   a. Reject any appeal which does not conform to Section 2 above;
   b. Uphold the Hearing Committee/Examiner's decision;
   c. Uphold the finding of guilt but modify the punishment;
   d. Vacate the decision and remand back to the Hearing Committee/Examiner for rehearing;
   e. Vacate the decision and the charge to permit recharge and rehearing; and
   f. Dismiss the charge and prohibit recharge.

The Program Review Committee may not impose a greater punishment than has been designated by the Hearing Committee or Examiner. The Program Review Committee shall render its decision within five (5) working days of receipt of an appeal.

B. Appeals to the Superintendent

1. The inmate may appeal the decision of the Program Review Committee to the Superintendent in accordance with the appeal procedures described for Program Review appeals above. This review shall, for the purposes of the Consolidated Inmates Grievance Review System, BC-ADM 804 be considered the Appeal from Initial Review Decision.

2. The Superintendent, upon receipt of the request for review may make any decision permitted to the Program Review Committee. The decision of the Superintendent shall be forwarded to the inmate within three (3) working days of receipt of the appeal. Any working day during this period when the Superintendent is absent from the institution for the entire day, shall not be counted against the allotted time for response.

3. The Superintendent will address all issues raised by the inmate and may, at his discretion, consider

any other matter relevant to the issues raised. He is not required to address any issue not raised by the appellant. He will issue a brief statement of the reasons for his decision.

C. Final Appeal

Final appeal shall be to the office of the Chief Counsel pursuant to the provisions of BC-ADM 804, Consolidated Inmate Grievance Review System.

VIII. WAIVER

A. An inmate may voluntarily waive the hearing described in Section V at anytime prior to the hearing's completion. He may also waive any time limitations relating to the hearing or the service of notice.

B. All waivers shall be in writing and shall be signed and dated by the inmate.

IX. INMATE'S REFUSAL TO ATTEND HEARING

When an inmate refuses to attend a hearing as described in Section V, the following procedures shall apply.

A. The inmate shall be informed that he has a right to a hearing, but that he may waive that right by signing a written waiver. He should also be informed that if he waives the right, the hearing committee will decide if he is guilty without his presence and if he is found guilty, discipline will be imposed. If the inmate agrees to sign the waiver, it should contain a statement that he has been advised as detailed above.

B. If the inmate refuses to go to the hearing or sign a written waiver, the hearing will be held in absentia. If at any time during the time he is subject to discipline for the misconduct (restriction of privileges or confinement in disciplinary confinement) the inmate reconsiders and wishes to have a hearing, one will be scheduled for him. The inmate may not appeal any decision made by the hearing committee/examiner during a proceeding which he has refused to attend.

C. If an inmate requests such a hearing, it shall be scheduled as soon as possible after the request is made.

D. If the inmate is found guilty, the hearing committee may not impose any greater discipline than was imposed at the first hearing. The inmate shall be given credit against the new discipline for any discipline to which he was subject prior to the second hearing.

X. INMATE UNABLE TO ATTEND

If, in the opinion of the Hearing Committee/Examiner, the inmate is physically or mentally unable to attend or participate in a hearing as described in Section V, he shall postpone the hearing until the inmate is able to attend and participate. The decision to postpone a hearing under this section shall be in writing and shall be made close to the time the hearing would have been held.

XI. PERIODIC REVIEW BY PROGRAM REVIEW COMMITTEE

A. The Program Review Committee, will interview, in person, at least once every thirty days, those inmates assigned to Disciplinary Custody. The determination of whether continued confinement is warranted will be based upon a review of the counselor's notes and recommendations, psychological and pyschiatric reports when available, recommendations by other staff and their written observations regarding his attitude and actions and his attitude and actions during the interview.

B. The Program Review Committee shall, after interview, submit to the Superintendent a status report detailing the reasons the Program Review Committee feels that continued Disciplinary Custody is necessary for the inmate. The Superintendent shall review the report and determine whether the reasons set forth are valid and reasonable.

C. The Superintendent shall report to the Commissioner of Correction inmates detained in Disciplinary Custody for more than 30 days. He shall include or review his own comments, and of those of the Program Review Committee.

D. All inmates continuously confined in Disciplinary Custody for a period of one year shall be given annual psychological or psychiatric examinations during this confinement.

XII. SUSPENSION DURING EMERGENCY

In an extended emergency situation or extended disruption of normal institution operation, any provision or section of the Directive may be suspended by the Superintendent for a specific period of time with the approval of the Commissioner or Correction.

XIII. RIGHTS UNDER THIS DIRECTIVE

This directive sets out policy and procedure. It does not create rights in any person nor should it be interpreted or applied in such a manner as to abridge the rights of any individual. The directive should be interpreted to have sufficient flexibility so as to be consistent with law and to permit the accomplishment of the purpose of the directives and policies of the Bureau of Correction.

XIV. EFFECTIVE DATE

The foregoing has been approved by the Bureau of Correction and shall be effective May 1, 1984. This supersedes all previous directives on this subject and shall apply to all state correctional institutions and regional correctional facilities.

GLEN R. JEFFES
Acting Commissioner

NO. 85-1630

Supreme Court, U.S.
FILED
SEP 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1985

LOWELL D. HEWITT, Superintendent;
B.B. KYLER, C.O. III; R.E STOTELMYER,
Major; B.K. SMITH, Counselor III;
K.R. HILEMAN, Farm Manager;
D.R. ERHARD, Deputy Superintendent
for Treatment;
T.W. HENRY, Director of Treatment;
W. MATEER, C.I. Manager,
Petitioners

v.

AARON HELMS,
Respondent

On Writ of Certiorari to the United
States Court of Appeals for the
Third Circuit

BRIEF FOR PETITIONERS

LeROY S. ZIMMERMAN
Attorney General

THOMAS G. SAYLOR, JR.
First Deputy Attorney General

ALLEN C. WARSHAW
Executive Deputy Attorney
General

ANDREW S. GORDON
Chief Deputy Attorney General

GREGORY R. NEUHAUSER
Senior Deputy Attorney General

Office of Attorney General
Commonwealth of Pennsylvania
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

QUESTION PRESENTED

Whether a civil rights plaintiff who received no personal benefit from his litigation, because his prayer for equitable and declaratory relief had been rendered moot and the defendants were immune from an award of damages, nevertheless is entitled to an award of attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 780 F.2d 367 (3d Cir. 1986) and may be found in the appendix to the petition for writ of certiorari. (Pet. App. 3a-25a) The opinion of the district court of March 14, 1985 (Pet. App. 26a-39a) is not reported.

JURISDICTION

The opinion of the Court of Appeals for the Third Circuit was issued on January 3, 1986. The petition for a writ of certiorari was filed within ninety days of that date and was granted on June 16, 1986. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 2 of the Civil Rights Attorney's Fees Awards Act of 1976, Pub.L. 94-559, October 19, 1976, 90 Stat. 2641, as amended, provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988.

STATEMENT OF THE CASE

Petitioners, current or retired officials of the Pennsylvania Department of Corrections, sought a writ of certiorari for this Court to review the decision of the Court of Appeals for the Third Circuit holding that respondent, Aaron Helms, was a prevailing party within the meaning of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. Helms v. Hewitt, 780 F.2d 367 (3d Cir. 1986). The Court granted the writ of certiorari on June 16, 1986.

This action began in the United States District Court for the Middle District of Pennsylvania on July 26, 1979. Helms filed it pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983, on his own behalf and his behalf alone. At that time, Helms was incarcerated in a state prison. J. App. 7a.

In his complaint, Helms challenged his detention in administrative segregation status at the prison pending completion of an investigation into allegations of misconduct, challenged the finding of guilt on the misconduct charges, and challenged his subsequent confinement to restricted custody. He sought declaratory and injunctive relief, together with damages, costs, attorney's fees and "[s]uch other relief as may be necessary and proper." J. App. 7a-21a.

On February 20, 1980, Helms was paroled from prison. On August 15, 1980, the District Court, considering cross-motions for summary judgment, entered judgment against Helms and in favor of the corrections officials. In so doing, the District Court held that Helms' confinement in administrative segregation

implicated no interest protected by the Fourteenth Amendment (administrative custody issue). In addition, the court held that the prison hearing committee's reliance upon information obtained from a confidential prison informant to find Helms guilty of misconduct was proper (informant testimony issue).

The Court of Appeals reversed the judgment of the District Court on both issues. Helms v. Hewitt, 655 F.2d 487 (3d Cir. 1981). The corrections officials then filed a petition for writ of certiorari in this Court seeking review on the administrative custody issue only. The petition was granted. Hewitt v. Helms, 455 U.S. 999 (1982).

This Court agreed with the Court of Appeals' decision that the prison system's regulations governing a prisoner's transfer to administrative

segregation created a liberty interest protectible by due process, but reversed the Court of Appeals' judgment, finding that Helms had received all the process that was due to protect that interest. Hewitt v. Helms, 459 U.S. 460 (1983). On remand, the Court of Appeals vacated its previous judgment on the administrative custody issue and directed the District Court to conduct further proceedings consistent with its original opinion on the informant testimony issue. Helms v. Hewitt, 712 F.2d 48 (3d Cir. 1983).[1]

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[1]The original direction to the district court was as follows: "Thus, on remand, if the defendants do not establish official immunity as discussed in Part IV infra, the district court should enter summary judgment for Helms on the issue whether he was denied due process in being confined in disciplinary custody." Helms, 655 F.2d at 502-03.

On remand to the District Court, the parties filed cross-motions for summary judgment on the informant testimony issue. The only question presented in the cross-motions was whether the prison officials were entitled to immunity from damages. J. App. 28a., Pet. App. 28a. Helms did not pursue requests for either declaratory or injunctive relief. The District Court entered judgment in favor of the officials and against Helms. J. App. 48a. Helms again appealed, claiming that the District Court had erred in determining that the officials were entitled to immunity and in failing to order them to expunge the prison misconduct charges based on the information

supplied by a confidential informant.[2] The Court of Appeals affirmed the District Court's judgment without opinion. Helms v. Hewitt, 745 F.2d 46 (3d Cir. 1984). In all appeals to the Court of Appeals, the prison officials argued that the declaratory and injunctive relief requested in the complaint had been rendered moot by Helms' release from prison in 1980.

After the District Court had entered judgment but before that judgment was affirmed on appeal, the Pennsylvania Bureau of Corrections issued an amended regulation known as "Administrative Directive 801: Inmate Disciplinary Procedures." J. App. 85a.

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[2]By virtue of his failure to pursue any claim for equitable relief in the District Court, the corrections officials argued on appeal that Helms had waived this claim.

Effective May 1, 1984, the amended directive established, for the first time, procedures for the use of confidential source information, i.e., information supplied by an informant, in the course of prison disciplinary proceedings. Pet. App. 10a.

Some months after the Court of Appeals affirmed the District Court in Helms' second appeal, 745 F.2d 46 (3d Cir. 1984), Helms filed an application for attorney's fees in the District Court. J. App. 49a, Pet. App. 11a. The District Court denied the application, finding that Helms had lost his claim for damages, that his claim for injunctive relief had been rendered moot by his release from prison in 1980, and that he had neither sought nor benefited

from the issuance of the Bureau of Corrections' amended Administrative Directive 801 in 1984. Pet. App. 27a-39a.

Helms again appealed to the Court of Appeals for the Third Circuit, and that court reversed on the ground that its earlier decision --that Helms' due process rights were violated by the use of information supplied by a confidential informant as the sole basis for conviction of a prison misconduct charge-- was a form of "judicial relief" sufficient to make Helms a prevailing party within the meaning of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. Pet. App. 17a-19a. The court concluded that its statement of the law in its first Helms

opinion, 655 F.2d at 503, was a declaration of rights qualifying as "judicial relief" for purposes of the Fees Act. Pet. App. 18a-19a. The court stated:

> We find that, on the facts before us, the plaintiff did actually obtain judicial relief of the same general type as that requested in his complaint.
> ***
> We find that the district court erred in failing to award attorney's fees for professional services relating to this issue.

Pet. App. 19a-20a. Further, the court held that, if Helms could prove that the amended Bureau of Corrections regulation had been caused by his litigation, he was entitled to prevailing party status on this basis as well. Pet. App. 23a. Accordingly, the Court of Appeals reversed and remanded to the District Court

for further proceedings on Helms' "catalyst argument and for calculation of the fee award." Pet. App. 26a.

Certiorari was granted to consider the question whether Helms was a prevailing party under the Civil Rights Attorney's Fees Awards Act even though his release from prison in 1980 mooted his prayers for equitable relief and petitioners were found to be immune from damages.

SUMMARY OF ARGUMENT

The Court of Appeals held that a civil rights plaintiff who receives no personal benefit from his litigation and who neither seeks nor achieves relief on behalf of a class of litigants nevertheless is entitled to an award of attorney's fees under 42 U.S.C. § 1988. This conclusion is inconsistent with the intent of the Attorney's Fees Awards Act and contrary to the policies underlying the doctrine of good faith immunity for executive branch officals.

A. There can be no doubt that respondent did not receive a personal benefit from this litigation. He sought damages, injunctive relief and a declaratory judgment, all on his behalf alone. Petitioners were found to be immune from damages as a matter of law, respondent received no injunction, and neither the

Court of Appeals nor the District Court directed the entry of a declaratory judgment. What the Court of Appeals found was that it had issued a "declaration" of law in the course of an appeal pursued by Helms before judgment ultimately was awarded in favor of petitioners. This "declaration" was not a declaratory judgment nor could it have been, since by that time respondent had long since been released from incarceration and there was no continuing controversy present. In fact, the court's assessment of the state of the law was made in the course of judging respondent's damages claim; as such, it was merely a prelude to consideration of petitioners' claim of good faith immunity. Thus, the result of this case provided no benefit to respondent nor to a class of plaintiffs on whose behalf he could have sued.

B. If the Court of Appeals is correct, moreover, the important policies behind good faith immunity for public officials is seriously weakened. In the first place, there is nothing in the legislative history to the Fees Act which indicates a congressional intent to alter the well-settled availability of official immunity to petitioners. Thus, to avoid the prospect of substantial fees, public servants would have to pursue litigation despite their entitlement to immunity from damages just to protect against a fees assessment, even where as here the pursuit would have no effect on the relief available on the substantive claims. This result not only dilutes the good faith immunity defense-- which is designed to pretermit unnecessary litigation against public

officials--but is contrary to decisions of this Court holding that responsibility for attorney's fees cannot be divorced from liability on the merits. Helms received no relief from petitioners as a result of his litigation; he should not receive fees for his lack of success.

ARGUMENT

A CIVIL RIGHTS PLAINTIFF WHO RECEIVES NO PERSONAL BENEFIT FROM HIS LITIGATION AND WHO SOUGHT NO RELIEF ON BEHALF OF A CLASS IS NOT A PREVAILING PARTY WITHIN THE MEANING OF THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT.

The Civil Rights Attorney's Fees Awards Act, 42 U.S.C. §1988, authorizes a federal district court to make an award of fees to the "prevailing party" in actions to enforce the Civil Rights Act of 1871, 42 U.S.C. § 1983. The Court of Appeals found that its statement of the law on the use of prisoner informant testimony in institutional discipline settings served "to affirm that the defendants' actions were unconstitutional," Pet. App. 19a, and therefore enabled Helms to claim prevailing party status even though Helms received no

benefit from the litigation and final judgment had been entered against Helms on all claims for relief. This decision is contrary to the intent of the Attorney's Fees Awards Act and inconsistent with the policies underlying good faith immunity.

A. The Attorney's Fees Awards Act Requires That The Plaintiff Or Those Whom He Represents Secure Some Relief In Order To Be Entitled To An Award Of Attorney's Fees

1. The Court of Appeals' decision is not in harmony with the purpose and intent of the Civil Rights Attorney's Fees Award Act. The purpose of the Fees Act is "to allow courts to provide the familiar remedy of reasonable counsel fees to prevailing parties in suits to enforce the civil rights acts which Congress has passed since 1866." 1976 U.S. Code Cong. & Ad. News 5909-10.

While the legislative history of the Act reveals that a party may be considered prevailing "without formally obtaining relief," Maher v. Gagne, 448 U.S. 122, 129 (1980),[3] it is apparent that "some relief on the merits of his claim" must

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[3]To illustrate this point, the legislative history refers to several prior decisions which fall into two general categories--cases in which the plaintiff himself received no benefit but the class on whose behalf he had sued obtained substantial relief and cases in which the plaintiff received relief by settlement, consent decree or a voluntary change in policy by the defendant. See S. Rep. 94-1011, p. 5, citing Kopet v. Esquire Realty Co., 523 F.2d 1005 (2d Cir. 1975) (action conferring benefit upon class); Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970)(same); Richards v. Griffith Rubber Mills, 300 F. Supp. 338 (D.Ore. 1969)(injunction inappropriate for defendants' unintentional violation); Thomas v. Honeybrook Mines, Inc., 428 F.2d 981 (3d Cir. 1970)(action conferring benefit upon class); Aspira of New York, Inc. v. Board of Education of the City of New York, 65 F.R.D. 541

(FOOTNOTE CONTINUED ON NEXT PAGE)

be obtained by the litigant or he may not be considered prevailing. Hanrahan v. Hampton, 446 U.S. 754, 757 (1980) (per curiam). In Hensley v. Eckerhart, 461 U.S. 424, 433 (1983), the Court stated that a "typical formulation" is that "plaintiffs may be considered

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FOOTNOTE CONTINUED

(S.D.N.Y. 1975)(class action resulting in consent decree with class relief). See also H.Rep. 94-1558, p. 7, citing Incarcerated Men of Allen County v. Fair, 507 F.2d 281 (6th Cir. 1974) (same); Parker v. Matthews, 411 F. Supp. 1059 (D.D.C. 1976)(settlement of named plaintiff's claims); Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir.), cert. denied, 409 U.S 982 (1972)(action conferring benefit upon class); Lea v. Cone Mills Corp., 438 F.2d 86 (4th Cir. 1971)(injunctive relief afforded to class); Evers v. Dwyer, 358 U.S. 202 (1958)(test case on behalf of racial minority). Here, respondent pressed no class claims--he sued on his behalf alone--and he received no relief, formal or otherwise. None of the cases mentioned in the legislative history involved a situation in which no party receives any relief.

'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." Ibid., quoting Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978). Thus, while the term "prevailing party" has been defined to require a showing by plaintiff of his "entitlement to some relief" and achievement of "some of the benefits the parties sought," the question remains whether a plaintiff is prevailing if the result of the litigation does not actually benefit the plaintiff or anyone whom he represents in the litigation.

The Court's discussion of the legislative history of the term "prevailing party" in Hanrahan v. Hampton, 446 U.S. at 758-59, is instructive.

There, the district court directed verdicts for defendants and plaintiffs appealed. The Court of Appeals reversed and remanded for a new trial, but also awarded the plaintiffs attorney's fees for the appeal under the Fees Act. This Court reversed the award of fees. 446 U.S. at 759. In so doing, the Court noted that an award may be made only to a party who has prevailed. While a "final judgment following a full trial on the merits" is not required, id. at 757, the Court stated that the Hanrahan plaintiffs' success in gaining a new trial did not qualify as a "determination of the 'substantial rights of the parties,' which Congress determined was a necessary foundation for departing from the usual rule in this country that each party is to bear the expense of his

own attorney." 446 U.S. at 758. Finding that the plaintiffs had not "prevailed on the merits of any of their claims," the Court considered them to be outside the meaning of "prevailing party" under the Fees Act. Id. at 758-759.

2. a. Under the standard established in Hanrahan, Helms was not a prevailing party. In his complaint, he sought injunctive relief, declaratory relief and damages. J.App. 19a-21a. He received none of this requested relief either from the District Court or voluntarily from petitioners. He received no injunction because his claim was moot by virtue of his release from prison. See Iron Arrow Honor Society v. Heckler, 464 U.S 67, 70 (1983) (per curiam). His claim for damages was rejected because petitioners were found, as a matter of

law, to enjoy good-faith immunity. J.App. 22a-48a. He did not obtain, nor did he even press for, a declaratory judgment.

What respondent did achieve -- if achievement it was -- was a declaration of law on the use of prisoner informant testimony. The Court of Appeals termed this a "declaration [which] is a form of judicial relief." Pet. App. 19a. The problem with this conclusion is that the Court of Appeals never directed entry of a declaratory judgment nor did the District Court ever enter one. In fact, it would have been demonstrably improper to grant Helms a declaratory judgment because, like the claim for injunctive relief, it had been rendered moot.

b. The Court has long held that the federal courts established pursuant to Article III of the Constitution

do not exist to render advisory opinions. Golden v. Zwickler, 394 U.S. 103, 108 (1969). "Concrete legal issues, presented in actual cases, not abstractions," are what is required. Ibid., quoting United Public Workers of America v. Mitchell, 330 U.S. 75, 89 (1947). The mandates of Article III "are not satisfied merely because a party requests a court of the United States to declare its legal rights...." Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 471 (1982). The Court "has always required that a litigant have 'standing'" to litigate, ibid., and that such exist at all stages of appellate review, not simply at the time the litigation is commenced. Roe v. Wade, 410 U.S. 113, 125 (1973).

The requirements of actual case or controversy and standing apply to actions brought for a declaratory judgment with the same force as to actions brought for other types of relief. Golden v. Zwickler, supra, 394 U.S. at 108. See also Ellis v. Dyson, 421 U.S. 426, 433 (1975); Steffel v. Thompson, 415 U.S. 452, 460 (1974). The Declaratory Judgment Act itself expressly provides that relief is available only "[i]n a case of actual controversy ...." 28 U.S.C. §2201. The remedy is "designed to permit an adjudication whenever the Court has jurisdiction, there is an actual case or controversy, and an adjudication would serve a useful purpose." 6A J. Moore, Moore's Federal Practice, ¶57-24 (3d ed. 1986). See also Borchard, Declaratory Judgments (2d ed. 1941), p. 299. The "question in each

case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interest, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Golden v. Zwickler, 394 U.S. at 108.

By virtue of respondent's release from prison prior to the decision on his first appeal, there was no "continuing controversy" among the parties respecting the claim for declaratory relief. See Perez v. Ledesma, 401 U.S. 82, 102 (1971) (Brennan, J., concurring in part and dissenting in part). This much is illustrated by two decisions of the Court. In Golden v. Zwickler, supra, the Court held that, despite Zwickler's

prior conviction for violating a state ban on distribution of anonymous political literature, his claim for declaratory relief was moot by virtue of his failure to demonstrate the likelihood that he would engage in this activity in the future. 394 U.S. at 109. In so holding, the Court rejected the rationale that Zwickler had a right on his behalf and those who shared his view to a general decision on the constitutionality of the state statute. Id. at 109-110.

Of particular import here is Ashcroft v. Mattis, 431 U.S. 171 (1977) (per curiam). In Ashcroft, the plaintiff sought damages for the death of his son, who had been killed by police while attempting to escape arrest, and a declaratory judgment that statutes authorizing the police action were unconstitutional.

The district court upheld the officers' defense of good faith and denied relief. The plaintiff took no appeal from the denial of damages, but sought review of the denial of declaratory relief. The court of appeals found that declaratory relief was available and remanded for consideration of the constitutional claim. After remand, the district court upheld the statute and the court of appeals reversed. On review, this Court held that there was no present controversy sufficient to justify a declaratory judgment. Ibid. "[T]he District Court was asked the hypothetical question whether the defendants would have been liable apart from their defense of good faith." Ibid. Because the case involved no "present right" of the plaintiff, there was no case or controversy. Id. at 172-73.

The situation is no different here. The Court of Appeals' "declaration" in 1981 had no relation to any "present right" of respondent. Although it preceded the decision on petitioners' immunity from damages,[4] the effect is identical to the declaration in Ashcroft: the litigant gains nothing other than the personal satisfaction that the

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[4]The remand itself resulted in no benefit to Helms. By then he had been paroled from prison and his claim for damages subsequently was rejected as a matter of law. J.App. 22a. The finding of immunity certainly prevents an assessment of fees on the damages claim. Hanrahan, supra, 446 U.S. at 758. Accord Stevens v. Gay, 792 F.2d 1000, 1003 (11th Cir. 1986) (fees cannot be awarded against state officials who successfully assert good-faith defense in §1983 action).

defending officials' conduct was "wrongful." Id. at 172. There simply was no basis in this case for a conclusion that Helms received, or could have received, declaratory relief.

These principles recently have been reaffirmed in Green v. Mansour, No. 84-6270 (December 3, 1985), and City of Los Angeles v. Lyons, 461 U.S. 95 (1983). In Green, class actions were brought for declaratory, injunctive and "notice" relief against state officials for their administration of the federal Aid to Families With Dependent Children Program. While the actions were pending, Congress amended the relevant federal statutes, and the district court then found the cases to be moot and the requested "notice" relief to be barred by the

Eleventh Amendment. This Court affirmed, specifically stating that the propriety of declaratory relief must be "informed by the teachings and experience concerning the functions and extent of federal judicial power," slip op. at 8, and that, absent ongoing violations of law under the revised statutes, a declaratory judgment concerning past violations "would have to stand on its own feet as an appropriate exercise of federal jurisdiction...." Slip op. at 10.

Likewise, in the related context of an action for injunctive relief, past exposure alone to illegal conduct does not present an actual case or controversy "if unaccompanied by any continuing, present adverse effects." Lyons, supra, 461 U.S. at 102. Just as in Lyons, the prospect that respondent here would be subject to a real and immediate

threat of a repeated use of illegal prison informant testimony was, at best, extremely remote by the time of his release from prison in 1980. It had to be "assumed" that, after parole, Helms would "conduct [his] activities within the law and so avoid prosecution and conviction as well as exposure to the challenged course of conduct said to be followed by petitioners." Id., 461 U.S. at 103. In short, it was simply too speculative in 1981 that a claim for declaratory or injunctive relief would involve a question of "present right."[5] Ashcroft v. Mattis, supra, 431 U.S. at

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[5]As noted above, this case was not brought as a class action; therefore, the question whether unnamed class members could have pursued Helms' claims need not be reached. Cf. Bell v. Wolfish, 441 U.S. 520, 526 n.5 (1979).

172. See also Public Service Commission of Utah v. Wycoff Company, Inc., 344 U.S. 237, 241 (1952).

In reality, what the Court of Appeals decided by its "declaration" was only the first part of a two part inquiry into whether petitioners were liable to Helms in damages. In order to succeed on his claim for damages, Helms was required not only to prove a violation of his rights but he also had to overcome petitioners' asserted defense of immunity. All that the Court of Appeals' declaration accomplished, therefore, was a remand for the District Court to complete the inquiry, the result of which was a finding of immunity which was then affirmed. J.App. 22a. See Hanrahan v. Hampton, supra, 446 U.S. at 758-59.

c. The Court of Appeals here stressed that the Attorneys Fees Act is an endorsement of the "private attorney general" concept which recognizes that some incentive, in the form of attorneys fees, is necessary to encourage private parties to vindicate rights guaranteed by the civil rights statutes. Pet. App. 19a-20a. Of course, it is unquestionable that the fees statute is designed to permit private parties to enforce the civil rights statutes. S. Rep. 94-1011, p. 2-3; H. Rep. 94-1558, p. 1. But we do not understand the Act to use the term "prevailing party" to mean anything other than someone who succeeds on a "claim" which satisfies the case or controversy requirement of Article III. Although a "private attorney general" who succeeds may secure benefits to others by virtue of his personal success,

it hardly makes sense to construe the fees statute to permit recovery whenever a plaintiff's efforts arguably may be of assistance in the future to non-parties. And it would be especially anomalous in the context of this case because decisions of this Court subsequent to the Court of Appeals' statement of the law in 1981 have seriously eroded, if not overruled, that court's "declaration" of rights. See Illinois v. Gates, 462 U.S. 213, 230-31 (1983) (propriety of use of informant testimony to be tested by "totality of circumstances" test); Superintendent, Massachusetts Correctional Institution v. Hill, No. 84-438 (June 17, 1985), Slip op. at 10 (due process is satisfied where there is at least "some evidence" on the record to support a prison disciplinary tribunal's decision).

d. The Court of Appeals' reliance on the issuance of an administrative directive reflecting the Court of Appeals' "declaration" some time after petitioners were found to be immune from damages likewise is infirm. Of course, this change in procedure had no possible impact on respondent since he long since had been released from custody. If this action itself is a basis for fees, the result is counter-productive. Presumably, the petitioners could have avoided fees simply by issuing no directive and, instead, just informally advising prison hearing panels of the Court of Appeals' "declaration." It hardly is a sensible construction of the Fees Act to read it in a way which discourages orderly administration. Cf. Hewitt v. Helms, 459 U.S. at 471 (the "salutary development" of issuing regulations does not by

itself create protectible rights). The illogic of this approach is underscored by the fact that there apparently is no limit to the time period after final judgment during which officials must be vigilant lest their change in policy form the basis for a belated claim for fees.

B. It Is Inconsistent With The Policies Underlying The Doctrine Of Good Faith Immunity To Permit Recovery Of Fees Where The Defense Of Immunity Is Upheld.

Aside from its inconsistency with the fees statute and its legislative history, the Court of Appeals' decision seriously weakens the foundations of good faith immunity. In Harlow v. Fitzgerald, 457 U.S. 800 (1982), the Court held that government officials performing discretionary functions are entitled to immunity from damages, despite

a finding that they had violated a plaintiff's constitutional rights, if the constitutional right was not "clearly established." Id. at 818-819. Good government requires that officials press ahead with their tasks vigorously without fear of liability should a court later decide that their actions were illegal. Id. at 807, 814. By adopting an objective standard to judge immunity claims, the Court was hopeful that the issue of good faith immunity could be decided prior to trial without the need for extensive discovery on the merits. Id. at 818.

If the Court of Appeals is correct, however, the benefits of Harlow to the effective operation of government are severely reduced. In many cases a

court addressing an immunity claim first will address whether the plaintiff has stated a claim and then decide whether the right on which he relies was clearly established.[6] Under the Court of Appeals' formulation, despite a finding of immunity, the plaintiff would be entitled to fees. One need look no further than the recent decision in City of Riverside v. Rivera, No. 85-224 (June 27, 1986) (attorney's fees of $245,456.25 justified where verdict was for $33,350),

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[6]On occasion, courts have assumed without deciding that a plaintiff's complaint states a valid claim and then decided that defendants were entitled to immunity. See, e.g., People of Three Mile Island v. NRC, 747 F.2d 139, 148 (3d Cir. 1984); Knies v. Richardson, Civ. No. 84-C-822 (E.D. Wis., January 14, 1985). Those decisions result in no "declaration" of rights and presumably no attorney's fee award. To have entitlement to fees depend upon which question the court chooses to answer first makes no sense.

to appreciate that the prospect of a substantial award of attorney's fees acts as a deterrent to vigorous exercise of executive discretion every bit as much as the potential for a damages award.

To be sure, nothing prevents Congress from abrogating or altering immunities. But as the Court recognized in rejecting a claim that the civil rights statutes abolished the doctrine of official immunity, there must be a "clear indication" of legislative intent before the Court will presume that Congress intended to alter a common law immunity. Pierson v. Ray, 386 U.S. 547, 554 (1967). See also Wood v. Strickland, 420 U.S. 308 (1975); Scheur v. Rhodes, 416 U.S. 323 (1974). This immunity is available to petitioners by virtue of

their positions as executive branch officials called upon to perform discretionary functions. Scheur v. Rhodes, 416 U.S at 241-42. There is no indication in the legislative history to the Fees Act of a congressional intent to alter the doctrine of official immunity in such a way as to permit the recovery of fees against an official who successfully has asserted immunity on the merits. Indeed, as the Court stated in Hutto v. Finney, 437 U.S. 678, 700 (1978), attorney's fees awards against officials in their individual capacity "were not to be affected by the statute...." If Congress had intended otherwise, it easily could have said so, as it did with regard to States' liability for fees. Hutto v. Finney, 437 U.S. at 700. In the absence of such a statement, there is no reason to abrogate

petitioners' well-settled immunity by imposing a fee award on them under circumstances in which they would be immune from an award of damages.

The Court has expressed some frustration with the substantial litigation which the Fees Act has encouraged. See Hensley v. Eckerhart, 461 U.S. 424, 437, 449-456 (Brennan, J., concurring in part and dissenting in part). The decision of the Court of Appeals here requires defendants to litigate further, despite a finding of immunity, for if a "declaration" of rights remains unreversed they are liable for what may be substantial attorney's fees. This "tail-wagging-the-dog" result, where the prospect of fees fuels litigation which

will have no ultimate effect on the relief awarded, illustrates the unsoundness of the conclusion reached below.

* * * *

"[L]iability on the merits and responsibility for fees go hand in hand...." Kentucky v. Graham, No. 84-849 (June 28, 1985), Slip op. at 5. Section 1988 does not authorize a fee against a party from whom no relief has been obtained; only the party "legally responsible for relief on the merits" is responsible for fees. Ibid. See also Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412, 418 (1978). It would be demonstrably unfair and out-of-step with the statutory scheme to permit recovery of attorney's fees from a defendant who was not found liable to the plaintiff.

In Hensley v. Eckerhart, 461 U.S. at 436, the Court held that "the most critical factor" in determining a reasonable fee under the Fees Act is "the degree of success obtained." See also Marek v. Chesny, No. 83-1437 (June 27, 1985), Slip op. at 9. If success is "critical" to the reasonableness of a fee already determined to be available, success must be of even greater importance when considering the threshold question of entitlement. The Fees Act should not permit an award in favor of a party who fails to obtain a benefit from his suit. To do so would torture the meaning of "prevailing party."

CONCLUSION

For the above-stated reasons, the decision of the Court of Appeals for the Third Circuit should be reversed with directions to affirm the District Court's denial of respondent's application for attorney's fees.

Respectfully submitted,

LeROY S. ZIMMERMAN
Attorney General

THOMAS G. SAYLOR, JR.
First Deputy Attorney General

ALLEN C. WARSHAW
Executive Deputy Attorney General

ANDREW S. GORDON
Chief Deputy Attorney General
Chief, Litigation Section

GREGORY R. NEUHAUSER
Senior Deputy Attorney General

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

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In the Supreme Court of the United States

OCTOBER TERM, 1986

LOWELL D. HEWITT, ET AL., PETITIONERS

v.

AARON HELMS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

HARRIET S. SHAPIRO
Assistant to the Solicitor General

WILLIAM KANTER
LINDA SILBERMAN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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INTEREST OF THE UNITED STATES

This case presents an important question concerning the interpretation of the term "prevailing party", to whom fees may properly be awarded under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988. A finding that a litigant is a "prevailing party" similarly triggers eligibility for awards of attorneys' fees against the United States under other fee statutes, such as 28 U.S.C. 2412(d) (the Equal Access to Justice Act) and 42 U.S.C. 2000e-5 (Title VII). Since this Court has in another context indicated that the standards it enunciates under 42 U.S.C. 1988 may be "generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party,' " *Hensley* v. *Eckerhart,* 461 U.S. 424, 433 n. 7 (1983), the United States has an interest in ensuring that "prevailing party" status is limited to those situtations intended by Congress.

STATUTE INVOLVED

42 U.S.C. 1988 provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 *et seq.*], or title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d *et seq.*], the court, in its discretion, may allow the prevailing partly, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT

On July 26, 1979, respondent Aaron Helms, then a state prisoner in Pennsylvania, brought this civil rights action in federal court. In his complaint, respondent alleged that state prison officials had violated his constitutional due process rights in three discrete ways: (1) by detaining him in administrative segregation status at the prison pending completion of an investigation into allegations of misconduct, (2) by finding him guilty of the misconduct charge on the basis of information from an "alleged informant" and (3) by holding him thereafter in restricted custody (J.A. 18a-19a). Respondent sought declaratory and injunctive relief (including the expungement of the misconduct determination from his prison record) in his individual capacity, along with damages, costs, attorney's fees and "such other relief as may be necessary and proper" (J.A. 19a-21a). The complaint did not, directly or by implication, assert that it was a class action, or contain any claim for class-wide relief (J.A. 7a-21a).

On February 20, 1980, respondent was paroled from prison. Nevertheless, (presumably because the claim for damages was not affected by his release from prison), on August 15, 1980, the district court reached the merits of his claims and granted summary judgment in favor of the

prison officials.[1] The district court held that no due process interest was implicated by respondent's confinement in administrative custody, that state officials had complied in all respect with state law, and that the prison hearing committee's reliance upon information secured from an unidentified informant was not improper. On appeal, the court of appeals reversed. *Helms* v. *Hewitt (Helms I)*, 655 F.2d 487 (1981). It held: (1) that respondent's segregation and continuation in administrative custody infringed a protected liberty interest and that summary judgment was improper because he was entitled to an opportunity to show that he was not given the prompt hearing that was due (*id.* at 498-500) and (2) that the determination of misconduct based on information received from an unidentified informant violated due process (*id.* at 501-503). The court of appeals left the issue of official immunity to the district court on remand (*id.* at 503). Prior to remand, however, this Court granted review to consider the extent to which the state's transfer of the respondent to administrative custody implicated the Due Process Clause. 455 U.S. 999 (1982). The certiorari petition presented no question relating to the use of informant testimony in the misconduct determination. This Court reversed the judgment of the court of appeals, holding that although respondent had a liberty interest protectible under the Due Process Clause, the State had accorded him all the process that was due. 459 U.S. 460 (1983).

On remand from this Court, the court of appeals directed the district court to conduct further proceedings consistent with the judgment in *Helms I* regarding respondent's claim relating to the use of informant

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[1] The district court's opinion is summarized at 655 F.2d 487, 492 (1981).

testimony. 712 F.2d 48 (1983). On remand from the court of appeals, the district court found that the prison officials were immune from damages (J.A. 22a-47a). Respondent did not pursue requests for either declaratory or injunctive relief, and the district court entered judgment in favor of the state officials (J.A. 48a). Respondent again appealed, pressing not only his claim for damages but also reasserting his expungement claim. The state supported the judgment below on alternative grounds, arguing that the claims for declaratory and injunctive relief had been waived by the failure to raise them on remand, and also that they were moot because of respondent's release from prison. The court of appeals affirmed without opinion. 745 F.2d 46 (1984).

In 1985, the district court denied respondent's application for attorney's fees under 42 U.S.C. 1988, finding that he was not a prevailing party because he obtained no relief or benefit from the litigation (Pet. App. 27a-40a). The court of appeals reversed (780 F.2d 367 (1986); Pet. App. 3a-26a), holding that respondent was entitled to attorney's fees on either of two theories. First, the court ruled that respondent had in fact obtained judicial relief, notwithstanding that immunity has precluded him from recovering damages and that he had received no injunctive relief. Referring to its merits decision in *Helms I,* the court of appeals reasoned that it had "declared that plaintiff's due process rights were violated" by use of the informant's report, and that this "declaration is a form of judicial relief which serves to affirm the plaintiff's assertion that the defendants' actions were unconstitutional and which will serve as a standard of conduct to guide prison officials in the future" (Pet. App. 18a-19a). Second, the court noted that in 1984, after the district court's ultimate judgment denying relief but prior to that judgment's affirmance by the Third Circuit, the Pennsylvania Bureau of Correction issued an amended regulation known as "Ad-

ministrative Directive 801: Inmate Disciplinary Procedures," which established, for the first time, procedures for the use of confidential source information in the course of prison disciplinary proceedings throughout the state (J.A. 85a-116a). The court of appeals observed that the litigation might have been a catalyst for the state's adoption of those procedures, and remanded the case to the district court for a factual determination as to whether the litigation had indeed been the catalyst for this procedural reform and for calculation of the fee award (Pet. App. 21a-24a). The court of appeals stated that although respondent had not requested any such procedural reform, "it must be said that plaintiff's complaint contemplated a modification in the treatment of all prisoners subject to disciplinary actions based on information obtained from confidential informants" (*id.* at 22a-23a). The court did not address the fact that respondent did not benefit from the reforms, because he had been released from prison four years before they were adopted.

Petitioners sought review in this Court, which granted certiorari to consider the question whether respondent was a prevailing party under the Civil Rights Attorney's Fees Awards Act, even though his release from prison in 1980 mooted his request for declaratory and injunctive relief and his claim for damages was precluded on grounds of immunity.

SUMMARY OF ARGUMENT

Only a "prevailing party" may be awarded attorney's fees under 42 U.S.C. 1988. The legislative history of this provision shows that a party may be considered to have prevailed if he achieves practical benefits from his suit even though there is no formal adjudication of entitlement to relief. But this Court's cases confirm that *some* benefit to the litigant himself is necessary before he can be considered to have prevailed. Thus, interim procedural vic-

tories do not justify an interim fee award in the absence of "some relief on the merits of [the] claims." *Hanrahan* v. *Hampton,* 446 U.S. 754, 757 (1980). Several courts of appeals have concluded that a favorable ruling on a legal principle, coupled with the denial of injunctive, declaratory and damages relief, does not qualify a litigant as a "prevailing party" eligible for an award of attorney's fees.

Sound policy supports this conclusion. If a favorable ruling on a legal principle provides a sufficient basis for an award of attorney's fees, the opposing party will be impelled to raise all such rulings on appeal, whether they are dispositive or not, or face the possibility that they may ultimately provide the basis for the award of a substantial attorney's fee. Correspondingly, the appellate courts would be required to reach the merits of such otherwise superfluous issues—either in reviewing the case on the merits or in the context of the fee litigation. Fee award controversies would thus create a major loophole in Article III's stricture against advisory opinions. Moreover, the increased burden of litigation would be felt by trial, as well as appellate, courts, because the filing of suits to establish "important legal principles" would be encouraged, regardless of the merits of the individual claims involved. This fostering of litigation to test abstract legal propositions is, of course, inconsistent with the policies underlying the Article III case-or-controversy requirement. Nothing in *Riverside* v. *Rivera,* No. 85-224 (June 27, 1986), or the "private attorney general" theory on which it is based, is inconsistent with our submission. Although an award of attorney's fees is appropriate to encourage litigation that serves important social goals by providing benefits to others *as well as* the litigant, the "private attorney general" rationale does not justify an award of fees to a party whose law suit serves *only* the interests of nonparties.

Respondent achieved no benefit from this litigation. Contrary to the suggestion of the court below, *Helms I* did not grant the functional equivalent of a declaratory judgment, which would in any event have been inappropriate because respondent's release from confinement prior to the district court's decision rendered his request for declaratory relief moot. Nor is this case the equivalent of a class action, in which the claims of the class survived. Both the complaint and the decisions on the merits focused solely on respondent's own individual grievances—there was no attempt to show that the treatment he received was in any way typical of the treatment accorded others, and neither the district court nor the court of appeals so held. Accordingly, the courts had no authority to award class-wide relief. It is true that the state's decision to issue Administrative Directive 801 may have benefited inmates confined in the state correctional institutions generally. That Directive, however, had no effect on respondent's suit and was not otherwise sufficiently related to it to make him eligible for attorney's fees as a "prevailing party."

ARGUMENT

I. SOME FORM OF RELIEF MUST BE OBTAINED IN ORDER TO ESTABLISH PREVAILING PARTY STATUS FOR PURPOSES OF AN ENTITLEMENT TO A FEE AWARD

42 U.S.C. 1988 gives a court discretion to allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. Thus, before any award of attorney's fees can be made, the plaintiff must show that he has obtained the status of a "prevailing party." Respondent simply did not prevail: he obtained no relief at all as a result of his suit, because the defendants were immune from damages and he had been released from prison before his case was adjudicated.

1. The legislative history of 42 U.S.C. 1988 and the decisions of this Court and of the courts of appeals strongly support the conclusion that a litigant is not a "prevailing party" unless he receives some benefit as a result of the litigation.

a. The legislative history of the Civil Rights Attorneys' Fees Awards Act, which amended 42 U.S.C. 1988 to permit the award of attorney's fees to the prevailing party, made it clear that the standards for awarding fees under 42 U.S.C. 1988 are to be "generally the same as under the fee provisions of the 1964 Civil Rights Act", and specifically noted that, under that Act, "parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." S. Rep. 94-1011, 94th Cong. 2d Sess. 4-5 (1976). The context of that statement, as well as the cases cited in support of it,[2] show that while it is not necessary for fee eligibility to obtain *formal* relief, some practical relief on the merits must result, through either settlement, a consent decree, or voluntary action by the defendant.[3]

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[2] *Thomas* v. *Honeybrook Mines, Inc.*, 428 F.2d 981 (3d Cir. 1970) (intervenors' action triggered various judgments, agreements, and settlements); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970) (suit prompted company to take action implementing fair employment policies); *Kopet* v. *Esquire Realty Co.*, 523 F.2d 1005 (2d Cir. 1975) (summary judgment on securities laws claims resulted in release of certified financial statements for the first time); *Richards* v. *Griffith Rubber Mills*, 300 F. Supp. 338 (D. Ore. 1969) (after filing suit plaintiff obtained position sought); *Aspira of New York, Inc.* v. *Board of Education*, 65 F.R.D. 541 (S.D.N.Y. 1975) (consent decree).

[3] For example, if a plaintiff's claim is mooted by a defendant's remedial action, the plaintiff would be entitled to fees if the suit was the catalyst for the remedial action. This case does not involve such a situtation – the mootness here was caused by respondent's completion of his sentence, not by the later adoption of the new rules relating to informant testimony. See pp. 18-20, *infra*.

b. This Court's attorney fee decisions have reflected a similar understanding of the limits of the term "prevailing party". For example, in *Hensley* v. *Eckerhart,* 461 U.S. 424, 436 (1983), the Court emphasized that "Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit * * *. [T]he most critical factor is the degree of success obtained." The Court in that case adopted the "typical formulation" for the "statutory threshold" that must be crossed before a litigant may be awarded attorney's fees under the Act: "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit" (461 U.S. at 433, quoting *Nadeau* v. *Helgemoe,* 581 F.2d 275, 278-279 (1st Cir. 1978)). Similarly, in *Hanrahan* v. *Hampton,* 446 U.S. 754 (1980), the Court emphasized that the litigant must obtain "some relief on the merits of his claim" or he will not be considered "prevailing". The Court accordingly rejected the contention that a set of procedural victories for the plaintiff—*i.e.,* a reversal of a directed verdict and reversal of certain unfavorable discovery rulings—were sufficient to convert a litigant into a "prevailing party" entitling him to interim fees. An interim substantive victory for the prisoner in this litigation—in circumstances where the claim is dismissed on immunity grounds—should carry no greater status.

Similarly, this Court refused to permit a fee award against a state government merely because a party had successfully sued a state official in his personal capacity. "Section 1988 simply does not create fee liability where merits liability is nonexistent." *Kentucky* v. *Graham,* No. 84-849, (June 28, 1985), slip op. 5 (footnote omitted). As the Court emphasized there, "[l]iability on the merits and responsiblity for fees go hand in hand; where a defendant has not been prevailed against, either because of legal

immunity or on the merits, 1988 does not authorize a fee award against that defendant." See also slip op. 9 ("fee liability runs with merits liability"). This principle is controlling here. Respondent may have successfully advanced a substantive proposition in the course of the litigation, but he lost the litigation on immunity grounds, and was entitled to no other relief because his claim was mooted by the completion of his sentence. To permit attorney's fees in these circumstances is to convert Section 1988 into a "relief fund for lawyers", a purpose that the Court has expressly disavowed in *Kentucky* v. *Graham,* slip op. 8-9.[4]

c. The substantial weight of appellate court authority also supports the proposition that the plaintiff must obtain "some relief" to trigger prevailing party status.[5] See, *e.g., Taylor* v. *Sterrett,* 640 F.2d 663, 669 (5th Cir. 1981) ("The proper focus is whether the plaintiff has been successful on the central issue as exhibited by the fact that he has acquired the primary relief sought."); *Ward* v. *County*

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[4] Even in the context of a fee statute that does not refer to the prevailing party, the Court in *Ruckelshaus* v. *Sierra Club,* 463 U.S. 680, 685 (1983), rejected the view that the plaintiffs were entitled to recover their attorney fees because their lawsuit, which they had lost, had "helped to enforce, refine and clarify the law" and "assisted the EPA in achieving its statutory goals." The Court instead reaffirmed "one consistent, established rule"—that a "successful party need not pay its unsuccessful adversary's fees".

[5] The only inconsistent appellate court precedent of which we are aware (other than the decision below) is *Mantolete* v. *Bolger,* 791 F.2d 784 (9th Cir. 1986), which involved the award of an interim fee application. The considerations in that context may be somewhat different, although we believe that the Ninth Circuit's award of fees in *Mantolete* was in error and is in conflict with Ninth Circuit precedent. See *Chinese for Affirmative Action* v. *Lequennec,* 580 F.2d 1006 (9th Cir. 1978), cert. denied, 439 U.S. 1129 (1979). The *Mantolete* case was subsequently settled, as to both the merits and attorney's fees, and thus no further review was sought.

of San Diego, 783 F.2d 1385 (9th Cir. 1986) (where plaintiff lacked standing, fact that decision contained a statement of constitutional violation would not confer prevailing party status). In *Harrington* v. *Vandalia-Butler Board of Education,* 585 F.2d 192 (6th Cir. 1978), cert. denied, 441 U.S. 932 (1979), plaintiff had, like respondent, obtained a favorable interim ruling, but ultimately obtained no relief. Harrington succeeded in obtaining a determination that the defendant Board had discriminated against her in the conditions of her employment. She failed, however, to establish that she was constructively discharged or that she was discriminated against in the salary she received; thus she was not entitled to back pay, reinstatement or injunctive relief. She was, accordingly, unable to meet the threshold test of 42 U.S.C. 1988. The court in *Harrington* emphasized: "In order to be a prevailing party, a plaintiff must have been entitled to some form of relief at the time suit was brought." 585 F.2d at 197.[6]

Similarly, in *Carbalan* v. *Vaughan,* 760 F.2d 662 (5th Cir. 1985), a jury found that the plaintiff's constitutional rights were violated, but he obtained no relief against the defendant municipal judge (on immunity grounds) or against the defendant city (because there was no vicarious liability). The court of appeals concluded that he lacked "prevailing party" status under 42 U.S.C. 1988, holding that a plaintiff cannot recover attorney's fees for the pursuit of claims on which he obtained no relief, judicial or otherwise.[7] Cf. *Mazanec* v. *North Judson-San Pierce*

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[6] Compare *Richards* v. *Griffith Rubber Mills,* 330 F. Supp. 338, 340 (D. Ore. 1969), where the employee, who had been appointed to the job after suit was filed, was not entitled to back pay or injunctive relief, but did receive an award of $250 in attorney's fees.

[7] Relying on plaintiff's proposed pretrial order in which he sought only damages, the court also rejected plaintiff's contention that his general prayer for relief in the complaint for " 'such other and further

School Corp., No. 85-2977 (7th Cir. Aug. 12, 1986) (denying attorney's fees in Section 1983 case where defendants were entitled to immunity and requests for injunctive and declaratory relief were moot).

2. We submit that permitting a litigant to receive an award of attorney's fees as a "prevailing party" regardless of whether he ultimately benefits from the litigation would have serious adverse consequences.

As a practical matter, it would burden litigants and appellate courts alike by greatly increasing the incentives to appeal unfavorable rulings on every issue in a case. In the absence of an appeal, an unfavorable ruling on a nondeterminative and unappealed issue in the litigation—here the *Helms I* holding on the use of informant testimony—could trigger a very substantial fee liability, even when, as here, the plaintiff is entitled to no other relief in the litigation.[8] A defendant would thus be impelled to pursue appeals on otherwise superfluous issues in the case, lest some legal proposition be established in the course of the litigation that ultimately results in a fee award. Conversely, plaintiffs would have an incentive to pursue appeals in an effort to establish such legal propositions even if they could not secure any relief or benefit for themselves in the litigation. Trial courts would also be seriously affected by such efforts. Indeed, in many instances the effect of such an interpretation of "prevailing party" would be to subsidize lawyers who bring lawsuits to

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relief * * * to which plaintiff may be entitled' " constituted a demand for declaratory and injunctive relief to which he was entitled under the jury verdict (760 F.2d at 665).

[8] We note that, in light of subsequent decisions of this Court, if the state had raised the informant issue in its certiorari petition and the Court had ruled on it, *Helms I* might well have been reversed on this issue also. See *Superintendent, Massachusetts Correctional Institution* v. *Hill*, No. 84-438 (June 17, 1985); *Illinois* v. *Gates*, 462 U.S. 213 (1983).

establish "important propositions" of law rather than to vindicate the rights of individual clients by securing relief for them.

Moreover, if fee awards were available for non-benefiting "prevailing" parties, appellate courts would be required, at the behest of defendents, to rule (either on direct appeal or in the course of fee litigation) on issues that there would otherwise be no need for them to reach. There is no reason to believe that Congress intended any fee award statute to work such an incursion into the stricture against advisory opinions contained in Article III of the Constitution.

3. Nothing in *Riverside* v. *Rivera,* No. 85-224 (June 27, 1986), casts the slightest doubt on the proposition that the plaintiff who brings the litigation must himself derive "some benefit" from the litigation in order to be eligible for a fee award. The plurality in *Riverside* recognized congressional intent that "a plaintiff who obtains relief in a civil rights lawsuit ' "does so not *for himself alone* but *also* as a 'private attorney general', vindicating a policy that Congress considered of the highest importance" ' " (slip op. 12 (emphasis added), quoting H.R. Rep. 94th Cong. Sess. 2 (1976), and *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402 (1968)). The plurality also noted the importance of controlling fee awards, and identified various safeguards that "protect against the possibility that 1988 might produce a windfall to civil right attorneys" (slip op. 17-18). Awarding attorneys' fees for vindication of important civil rights in a case where appropriate injunctive or nominal damage relief is granted is a far cry from permitting such fees when the plaintiff himself is not entitled to any relief. Recognizing that a "private attorney general" may secure benefits to others *as well as to himself* is not the equivalent of rewarding a plaintiff for asserting the rights of non-parties with future grievances. Ignoring this crucial distinction would encourage lawyers to pay

little heed to the ultimate merits of the litigation they pursue, and to adopt as their only goal the establishment of some threshold legal principle, for which they will be rewarded irrespective of the merits of their client's own claim. Neither this Court nor Congress has extended the "private attorney general" concept to such self-appointed proxies for the interests of other persons.[9]

II. RESPONDENT OBTAINED NO RELIEF ADEQUATE TO JUSTIFY IDENTIFYING HIM AS A "PREVAILING PARTY" UNDER 42 U.S.C. 1988

1. The court of appeals did not in terms reject the proposition that some relief, judicial or otherwise, is a prerequisite to the establishment of "prevailing party" status. Instead, it characterized its holding in *Helms I* on the use of informant testimony, as a "declaration"—implying that it had been tantamount to a declaratory judgment. The court stated (Pet. App. 18a-19a, citations omitted):

> We reject the defendants' contention that plaintiff failed to obtain judicial relief. In *Helms I,* we declared that plaintiff's due process rights were violated by the prison officials' unconstitutional use of the hearsay report. * * * Our declaration acts as an important vindication of the plaintiff's rights. * * * The declaration is a form of judicial relief which serves to affirm the plaintiff's assertion that the defendants' actions were unconstitutional and which will serve as a standard of conduct to guide prison officials in the future.

a. This analysis fails for a number of reasons. In the first place, it misreads *Helms I* itself. The court there did not hold that respondent was entitled to a declaratory

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[9] Some fee statutes, such as 28 U.S.C. 2412(d) (Equal Access to Justice Act), are not in any event based on a "private attorney general" rationale.

judgment. It did rule that respondent had "suffered a denial of due process by being convicted on a misconduct charge when the only evidence offered against him was a hearsay recital, by the charging officer, of an uncorroborated report of an unidentified informant." 655 F.2d at 502. But the court, in remanding the case, directed only that "if the defendants do not establish official immunity * * * the district court should enter summary judgment for Helms on the issue whether he was denied due process in being confined in disciplinary custody" (*id.* at 502-503). Respondent thus achieved in *Helms I* no more than the type of interim procedural victory this Court found in *Hanrahan* v. *Hampton, supra,* to be insufficient to confer "prevailing party" status.

b. In the decision below the court of appeals refers (Pet. App. 17a) to the broad relief sought by respondent in his complaint, which included a request for a "declaratory judgment, declaring plaintiff's rights under the Fourteenth Amendment and 42 U.S.C. 1983 violated as more specifically set forth in this Complaint" (J.A. 19a), and asked the court to "order the reversal of the disciplinary conviction set forth in this Complaint and order it expunged from plaintiff's inmate, institutional and Bureau of Correction records" (J.A. 20a). But nothing in *Helms I* refers to those broad requests for relief. In particular, it did not direct the district court to address them on remand. In fact, the only issue presented to the district court on the remand was whether the prison officials were entitled to immunity from damages. No request for declaratory of injunctive relief was ever renewed in the district court. Futhermore, because the court of appeals affirmed the district court's immunity holding without opinion (745 F.2d at 46), no court has ever addressed respondent's claim for declaratory and injunctive relief.

c. This failure was not an oversight. Respondent had been released from prison before the initial district court decision rejecting his complaint in its entirety. Accordingly, the courts at all stages in this litigation have been precluded from granting injunctive or declaratory relief on petitioner's claims relating to his treatment while in confinement, because his release had mooted all such claims for relief. *Golden* v. *Zwickler,* 394 U.S. 103 (1969); *Ashcroft* v. *Mattis,* 431 U.S. 171, 172-173 (1977) (claim of parent who was not entitled to damages that "he will obtain emotional satisfaction from a ruling that his son's death was wrongful" not sufficient. "Emotional involvement in a lawsuit is not enough to meet the case-or-controversy requirement; were the rule otherwise, few cases could ever become moot."); cf. *City of Los Angeles* v. *Lyons,* 461 U.S. 95 (1983).[10]

d. Indeed, had the district court based its original grant of summary judgment to the petitioners on the ground of qualified immunity, rather than rejecting respondent's claims on the merits, the court of appeals would presumably simply have affirmed that ruling (as it subsequently did at 745 F.2d 46). There would in that

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[10] If these claims had not been moot, and if respondent had been found entitled to declaratory or injunctive relief, he would qualify as a "prevailing party" for the award of attorney's fees only if he had "succeed[ed] on any significant issue in [the] litigation" (*Hensley* v. *Eckerhart,* 461 U.S. 424, 433 (1983)), and the relief accorded was "significant". Compare *Best* v. *Boswell,* 696 F.2d 1282, cert. denied, 464 U.S. 828 (1983) (procedural due process violation not sufficient to trigger award of attorney's fees in suit seeking reinstatement and $1 million in damages) and *Kentucky Ass'n for Retarded Citizens* v. *Conn,* 718 F.2d 182 (6th Cir. 1983) (class action plaintiff not "prevailing party" where declaratory relief obtained was not significant part of relief sought) with *Fast* v. *School District,* 728 F.2d 1030 (8th Cir. 1984) (en banc) (plaintiff in Section 1983 civil rights action who was held constitutionally entitled to post-termination hearing but was refused reinstatement and pre-layoff hearing was "prevailing party").

event have been no occasion for the court of appeals to consider the informant issue at all. It is particularly inappropriate to assess attorney fees against the state on the basis of a ruling that has resulted only from the district court's choice of alternative grounds on which to base its judgment in favor of the state. Cf. *Ashcroft* v. *Mattis*, 431 U.S. at 172-173. The fee statutes should not be interpreted to place such a premium on the reasoning—and even the dicta—in opinions, as opposed to the judgments actually rendered.

2. Even if *Helms I* could appropriately be read as a "declaration of rights" analogous to a declaratory judgment, that declaration did not in any way benefit respondent who had already been released from prison, and thus cannot justify an award of attorney fees to him. Nor can the Third Circuit's view (Pet. App. 19a) that its "declaration" was a form of judicial relief "which will serve as a standard of conduct to guide prison officials in the future" be a basis for attorney's fees on a "private attorney general" rationale (see pp. 13-14, *supra*). The court of appeals was without authority to grant any such widespread relief in this case, which was a suit by an individual prisoner, not a class action. See, *e.g.*, *Ameron, Inc.* v. *U.S. Army Corps of Engineers*, 787 F.2d 875 (3d Cir. 1986) (petition for rehearing granted on other grounds); *National Center for Immigration Rights, Inc.* v. *INS*, 743 F.2d 1365, 1371 (9th Cir. 1984). The only "declaration of rights" that the courts could make in this case was one affecting respondent's individual rights—and at the time the court of appeals addressed the due process informant issue, respondent's claim for declaratory and injunctive relief was moot.

To view this case as the functional equivalent of a class action in order to justify the award of fees would be effectively to transform an individual lawsuit into a class action without compliance with the requirements of Fed. R. Civ.

P. 23. Moreover, the respondent's prayer for relief in this case did not request any broad change in procedures, and thus cannot reasonably be read as requesting the functional equivalent of class relief. Instead, the relief requested related solely to the status of respondent himself: he sought his own release from restrictive custody status and return to the general prison population, reversal of the individual hearing committee decision that he was guilty of assaulting a corrections officer, and expungement of that decision from his prison records (J.A. 19a-21a).

3. Although the court thus could not have ordered a general change in procedures solely because of the due process violation in this individual case, the state on its own initiative adopted Administrative Directive 801: Inmate Disciplinary Procedures (J.A. 85a-116a). This directive, effective May 1, 1984, detailed for the first time the procedures to be followed in correctional facilities throughout the state with respect to the use of confidential source information generally (J.A. 101a-102a) and thus may in fact have achieved "class-wide" benefits.[11]

We do not believe that respondent's suit can properly be said to have caused, or to have been "a catalyst for," any class-wide relief resulting from the directive, for purposes of a fee award. First of all, the adoption of the directive had no effect whatsoever on respondent's suit or the claims reflected in it—which were by then moot, except for the damage claims rejected on immunity grounds. Any

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[11] The directive, which "does not create rights in any person" (J.A. 115a), permits the use in misconduct hearings of evidence supplied by an undisclosed informant when the responsible officials determine that his identity "should remain confidential" (J.A. 101a), if the informant's reliability is established by the preponderance of the evidence (*ibid.*) Both the informant's testimony and evidence establishing his reliability may be presented in camera where necessary (J.A. 101a-102a). Since this case was decided on summary judgment, there is no indication in this record of the precise procedures utilized in repondent's misconduct hearing.

"catalyst" relationship between the suit and the directive, therefore, is basically of a suggestion-box nature, but attorney fees obviously are not available for an endeavor such as the preparation of a letter suggesting such a change. Moreover, respondent's suit cannot even be said to have made such a suggestion. Respondent did not bring this action as a class action to challenge the state's procedures in general, and this record thus does not even contain unsupported allegations about the nature of the original procedures. Indeed, respondent's complaint is inherently ambiguous: he may have alleged either that the established procedures were unconstitutional, or that he was singled out for unconstitutional adverse treatment. His decision to sue only the officials at the facility in which he was confined, not state officials who could remedy defects in state-wide procedures, as well as his decision to sue those officials in their individual as well as their official capacities (J.A. 10a), support the latter, rather than the former, interpretation and, in any event, undermine a "catalyst" basis for a fee award here. Cf. *Kentucky* v. *Graham, supra.*

Even apart from those considerations, we doubt that it would be appropriate to award respondent an attorney's fee on the basis of the state's promulgation of the directive. Respondent's complaint and the court's decision in *Helms I* both focused only on respondent's own situation. In contrast, the directive deals with the entire subject of inmate misconduct throughout the state's correctional system. It defines the kinds of activities that constitute misconduct, establishes a Hearing Committee to determine whether misconduct has occurred, provides for administrative review of the decisions of that Committee, and establishes the procedures to be followed both by the Committe and on administrative review (J.A. 85a-116a). This broad directive obviously reflects the state's experience in dealing with the entire range of prisoner

behavior in administering its correctional facilities. The relation between any particular misconduct hearing and a particular provision in the directive is likely to be tenuous at best. Moreover, the states would scarcely be encouraged to promulgate directives regularizing their methods for dealing with prisoner misconduct if such directives can trigger the award of attorney fees to former prisoners who had been subjected to the superseded procedures, even when they are no longer confined and have obtained no other relief whatever.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

HARRIET S. SHAPIRO
Assistant to the Solicitor General

WILLIAM KANTER
LINDA SILBERMAN
Attorneys

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In the Supreme Court of the United States

OCTOBER TERM, 1986

LOWELL D. HEWITT, ET AL., PETITIONERS

v.

AARON HELMS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT

JOHN M. HUMPHREY
ROBERT H. VESELY
161 West Third Street
P.O. Box 215
Williamsport, PA 17701
(717) 323-8711

Attorney for Respondent

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STATEMENT OF THE CASE

Petitioners, officials of the Pennsylvania Department of Corrections, sought a Writ of Certiorari for this Court to review the decision of the Court of Appeals for the Third Circuit holding that Respondent, Aaron Helms, was a prevailing party within the meaning of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. Section 1988. Helms v. Hewitt, 780 F.2d 367 (3rd Cir. 1986). The Court granted the Writ of Certiorari on June 16, 1986.

Respondent filed his Complaint on July 26, 1979, seeking damages and injunctive and declaratory relief. (J.A. 7a -21a). On August 12, 1979, Petitioners filed a Motion to Dismiss or, in the alternative, for summary judgment. On September 28, 1979, the magistrate recommended granting the Petitioners' Summary Judgment Motion. On November 7, 1979, the District Court declined to adopt the Magistrate's recommendation. On November 16, 1979, Defendants filed an

answer to the original Complaint. On May 12, 1980, Respondent filed his Motion for Summary Judgment. Petitioners, on May 27, 1980 filed a Cross Motion for Summary Judgment. On August 15, 1980, the District Court granted Summary Judgment for the Petitioners on the ground that it found that no violation of any right secured by the Constitution had occurred.

On June 30, 1981, the Circuit Court reversed the District Court's judgment and taxed costs in favor of Respondent. Helms v. Hewitt, 655 F.2d 487 (3rd Cir. 1981). The Petitioners petitioned for Writ of Certiorari on the issue of what process was due for administrative confinement. The Petitioners chose not to raise the unconstitutionality of their reliance on unidentified informants in their Petition. The Petition was granted by the Court on March 8, 1982, Hewitt v. Helms, 455 U.S. 999 (1982) and on February 22, 1983, the Court reversed the judgment of the

Circuit Court. Hewitt v. Helms, 459 U.S. 460 (1983). On remand from the Court, the Circuit Court concluded that its declaration as to the unconstitutionality of the practices of using unidentified informants was not affected by the Court's mandate. Hewitt v. Helms, 712 F.2d 488 (3rd Cir. 1983). The Circuit Court then remanded the case to the District Court to determine whether qualified immunity was applicable. Both Respondent and Petitioners filed Motions on the issue of qualified immunity and on February 3, 1984, the District Court denied Respondent's Motion and ruled in favor of the Petitioners. A second appeal to the Circuit Court followed wherein both parties challenged the District Court's judgment. During the pendency of this appeal the Bureau of Prisons promulgated regulations closely tracking the requirements set forth in the Circuit Court's holding relating to the unconstitutionality of the prison tribunal's use of information supplied by an

unidentified informant. (J.A. 101a - 102a). The Circuit Court subsequently affirmed the judgment of the District Court on August 21, 1984. On December 7, 1984, Respondent filed a Petition for Attorney's Fees with the District Court. After filing of Briefs by both parties, the District Court on March 14, 1985, entered an Order denying Respondent's Petition for Attorney's Fees. (Appendix, Petition for Certiorari, 27a - 40a). On his first appeal to the Circuit Court the Respondent specifically sought declaratory relief from the Circuit Court. The Petitioners' Brief on this first appeal does not indicate any argument with regard to declaratory relief being moot.

Respondent appealed the denial of attorney's fees to the Third Circuit and the Third Circuit reversed. (Pet. App. 3a - 26a); 780 F.2d 367 (1986). The Circuit Court held that Respondent was entitled to attorney's fees on either of two theories.

First, the Court ruled that Respondent had in fact obtained judicial relief, by virtue of the Circuit Court's declaration that Plaintiff's due process rights were violated by the state officials. The Circuit Court noted that this declaratory relief served not only to vindicate the Respondent's constitutional rights, but it served as a standard of conduct to guide prison officials in the future. (Pet. App. 18a - 19a). Second, the Circuit Court noted that the issuing of specific regulations by the Pennsylvania Bureau of Corrections which regulations established procedures in conformity with its holding, indicated that Respondent's suit may have acted as a catalyst for the state's adoption of the regulations. The Circuit Court, therefore, remanded the case to the District Court for a factual determination as to whether the litigation had been the catalyst for the procedural reform. (J.A. 85a - 116a; Pet. App. 21a - 24a). The Court of Appeals

specifically noted that the nature of Plaintiff's Complaint, which sought declaratory relief against the Petitioners in their official and individual capacities, "contemplated a modification of the treatment of all prisoners subject to disciplinary actions based on information obtained from confidential informants." (Pet. App. at 22a - 23a).

SUMMARY OF ARGUMENT

The circuit court correctly held that a civil rights Plaintiff succeeds on a significant issue in litigation when he vindicates his constitutional rights. In fact, for purposes of 42 U.S.C. Section 1988, by obtaining a ruling that his constitutional rights had been violated by state officials, a Plaintiff succeeds on the most significant issue in the litigation. The legislative history makes it abundantly clear that Section 1988 was designed for the express purpose of fostering the important congressional policy of having the constitution and federal laws protected by private actions. In private actions, the individual functions as a private attorney general and thereby vindicates not only his rights but the rights of all citizens. Respondent's action was an almost classic example of the proper functioning of the private attorney general concept. Respondent by vindicating his rights through declaratory relief vindi-

cated not only his own constitutional rights, but the rights of all other prisoners who have or would in the future be subject to Petitioner's procedures before prison tribunals. Respondents did this in a manner which caused the least possible intrusion into the state's management of its own affairs. Further, Respondent submits, as an evidentiary hearing will demonstrate, that the relief received by Respondent, in fact, caused the Petitioner to promulgate regulations in keeping with the specifications set forth by the circuit court.

There can be little argument that the circuit court had the power and properly did declare that Petitioner had violated Respondents' consititutional rights. This declaratory relief was entered in a suit where the Petitioners had specifically been sued in their official capacities for declaratory relief. This Court has consistently held that declaratory relief is

appropriate where there is an active case or controversy with regard to monetary relief. This Court has also recognized that attorney's fees are approriate even in situations involving absolute immunity for damages. The opinions of this Court are fully supported by the legislative history of Section 1988 which specifically indicate that Congress contemplated the awards of attorney's fees in situations where damages would be barred or limited by immunity doctrines, especially when the state officials have from the inception of the suit been sued in their official capacity for official acts.

The circuit court's opinion in keeping with the decisions of this Court, reflects a proper concept of federalism and the functioning of declaratory judgments where attorney's fees are awarded for declaratory relief. Unlike injunctive relief, declaratory relief is not coercive. Declaratory relief merely declares that the

state's procedures are unconstitutional. This declaration, barring change in the practices, will be exactly the same regardless of how often the practice has occurred or when it occurs. Because the actual relief received will be exactly the same, it would wasteful of the Court's and the party's resources and of no real benefit to require that attorney's fees only be awarded in class action or injunctive relief situations. Such an approach would not only significantly and unnecessarily burden the courts, but it would have the effect of requiring the federal courts to intrude to a far greater extent into the management of the state's affairs. Logic and reason coupled with the legislative purposes behind Section 1988 indicate that it would be perfectly fitting, if not highly desirable, to award attorney's fees for the declaratory relief entered in this case.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY FOUND THAT HELMS WAS A PREVAILING PARTY ENTITLED TO AN AWARD OF ATTORNEY'S FEES.

On July 26, 1979, Respondent brought suit against Petitioners in their official and individual capacities for violation of his constitutional right to due process. (J.A. 9a-10a) Respondent, among other remedies, asked the Court to declare that his constitutional right to due process was violated by his conviction by a prison tribunal on disciplinary charges based upon an unverified and unsubstantiated account of an unidentified informant. Respondent's complaint indicates strongly that not only did he seek to have Petitioners' policy declared unconstitutional, but this was a primary interest in bringing the litigation. The very first sentence of Respondent's request for relief states:

> Wherefore, Plaintiff prays this Honorable Court:
>
> 1. Enter a Declaratory Judgment, declaring Plaintiff's rights

> under the Fourteenth Amendment and 42 U.S.C. Section 1983 violated as more specifically set forth in this Complaint. (J.A. 19a)

The Respondent also sought damages and "such other relief, as may be necessary and proper." (J.A. 20a-21a) On his first appeal to the Third Circuit, Respondent continued to press for declaratory relief and specifically requested the same from the Circuit Court.

> Wherefore, Appellant prays this Court reverse the Judgment of the District Court; enter appropriate declaratory and injunctive relief on Appellant's behalf; order his misconduct conviction of January 22, 1979, expunged from any and all institutional, inmate, or bureau correction files, records, or jackets; and remand this case to the District Court for an appropriate award of monetary damages on his bahalf.

Brief of Appellant, Aaron Helms, Circuit Court No. 80-2393.[1]

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[1] In Petitioners' brief to the Third Circuit No. 80-2393, the Petitioners never raised or contested the ability of the Circuit Court to enter declaratory relief for the Respondent.

On the issue of Respondent's conviction on a misconduct charge when the only evidence against him was a hearsay recital by the charging officer on an uncorroborated report from an unidentified informant, the Circuit Court held:

> That a prisoner is denied due process when his conviction on disciplinary charges was based solely on a hearsay report of an unidentified informant's account which offers no basis for an independent assessment of an informant's credibility or reliability.

Helms v. Hewitt, 655 F.2d 487 at 504 (3rd Cir. 1981). This holding by the Circuit Court was a straightforward declaration in favor of Respondent that his constitutional right to due process was violated by his conviction on disciplinary charges based upon an unverified and unsubstantiated account of an unidentified informant. While Respondent's claim for damages was eventually dismissed, based upon qualified immunity, this dismissal had nothing to do with the declaration that his constitutional rights had been violated.

This dismissal only went to whether he was entitled to damages for the violation of his rights, and had no effect on the unconstitutionality of Petitioners' official acts. There can be little argument that some of the benefit which Respondent sought in bringing his suit was to have the practices of Petitioners with regard to convictions based upon unidentified informants declared unconstitutional. There also can be little argument that Petitioners' actions were declared unconstitutional. In fact, the Circuit Court set forth basic minimum procedures which the Institutional Hearing Committee must follow in order to provide minimum due process.

> We, therefore, hold that when a prison tribunal's determination is derived from an unidentified informant, the procedure approved in Gomes v. Travisono, must be followed to provide minimum due process.

Helms v. Hewitt, supra at 502. The Circuit Court went on to set forth specifically the types of

minimum procedures necessary making reference to the holding in Gomes v. Travisono, 510 F.2d 537 at 540 (1st Cir. 1974). This holding by the Circuit Court benefited not only the Respondent by specifically vindicating his constitutional rights, but it also vindicated the constitutional rights of those persons who in the future might be in the same situation as the Respondent. The holding, therefore, not only acted as a deterrent to future violations, but also set forth the standard which would allow the Petitioners to avoid future constitutional violations. Petitioners' actions, as well as their own regulations, demonstrate that they had no procedural requirements for the use of statements made by unidentified informants when these statements are being used by a prison tribunal to convict a prisoner of misconduct. Further, the state has vigorously argued throughout this entire litigation that the tribunal's use of the

statement of the unidentified informant for conviction was not unconstitutional.[2] In contrast, the Petitioner's present regulations contain over one-half of a page of detailed procedural requirements for the use of information obtained from a confidential informant. (J.A. 101a-102a) These regulations were promulgated during the pendency of Respondent's second appeal to the Third Circuit and prior to the affirmance by the Third Circuit of the District Court's holding.

Despite the fact that Respondent specifically sought and received a vindication of his constitutional rights and despite the fact that the Petitioners, in fact, enacted regulations in keeping with the holding of the Third Circuit,

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[2]In fact, the Attorney General still attempts to contest the Third Circuit's holding. Brief for Petitioners, page 37. However, the Circuit Court's ruling on this matter is final and to the extent the Attorney General wished to contest this matter, he should have done this on his Petition for Certiorari to this Court. Pulliam v. Allen, 466 U.S. 522, 104 S.Ct. 1970 at 1981 n. 22 (1984).

the Petitioners assert that awarding counsel fees in this case would conflict with the purposes of 42 U.S.C. Section 1988. By virtue of the Circuit Court's ruling, Respondent succeeded on not only a significant issue but the most significant issue in the case and attained the clear benefit of having his constitutional rights vindicated--a vindication of rights, which 42 U.S.C. Section 1988 was expressly designed to promote. The Circuit court was, therefore, correct in finding that Respondent was a prevailing party for purposes of awarding attorney's fees.

II. THE CIRCUIT COURT'S HOLDING IS FULLY IN KEEPING WITH THE PURPOSES BEHIND SECTION 1988 AND THE DEFINITION OF PREVAILING PARTY STATUS EMBODIED IN SECTION 1988'S LEGISLATIVE HISTORY AND THE APPLICABLE CASE LAW.

As the Circuit Court quite properly noted, the focus of Section 1988 was not upon damage awards or remedies but upon making sure that individuals had access to the courts for purposes of vindicating the most fundamental rights guaranteed by our Constitution and laws.

> Private citizens are to be able to assert their civil rights, and if those who violate the nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

1976 U.S. Code Cong. & Ad. News 5910; S. Rep. No. 1011, 94th Cong. 2nd Sess. (1976) (emphasis added). Such a vindication occurs when "a party has prevailed on an important matter in the course of litigation." Id. at 5912. The Senate report further states:

> Moreover, for purposes of the award of counsel fees, parties may be considered to have prevailed when

> they vindicate rights...without formally obtaining relief.

Id. at 5912 (emphasis added). The House Report was fully in accord with the Senate Report's focus upon the vindication of constitutional rights and specifically states:

> [W]hile damages are theoretically available under the statutes covered by H.R. 15460, it should be observed that, in some cases, immunity doctrines and special defenses available only to public officials, preclude or severely limit damage remedy. Consequently awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal, Civil, and Constitutional rights are to be adequately protected.

H.R. Rep. No. 941558 p. 9 (1976). This Court has in two recent decisions made specific reference to the above-cited portion of the House Report. Pulliam v. Allen, 466 U.S. 522, 104 S.Ct. 1970 at 1982 (1984); City of Riverside v. Rivera, _____ U.S. _____, 106 S.Ct. 2686, 2696 (1986). The simple reading of the passages quoted earlier

from the Senate and House Reports make it abundantly clear that the focus of Section 1988 is the "vindication" of rights even in situations where immunity doctrines apply. The thrust of the legislative history behind Section 1988 is to award attorney's fees to the individual who by vindicating his constitutional rights has fulfilled a policy that Congress considered of the highest importance. Despite the Petitioners' assertions otherwise, the cases cited in the Senate Report bear out the fact that the focus of Section 1988 was not upon monetary damages or formal relief but upon the vindication of important rights and congressional policies which vindication ultimately inures to the benefit of society as a whole.

Awarding attorney's fees in the present case is fully in keeping with the definition of prevailing parties as set forth by the various circuits.

One of the most common standards for finding prevailing party status is that:

> The party is a "prevailing party" under this section if he or she succeeds on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit.

Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). In the present case, it strains credulity to argue that the constitutionality of the prison tribunal's decision making process was not a significant issue in this litigation. It is also a rather callous appraisal of the case to suggest that the vindication of one's constitutional rights is not a benefit and in fact a benefit specifically requested and received in the present case. As noted by one court where the plaintiff has prevailed by establishing a right "secured by the constitution", (42 U.S.C. Section 1983), Section 1988 contemplates the award of attorney's fees.

> By its expressed terms, Section 1988 authorizes an award to the prevailing

> party "in any action...to enforce a provision" of Section 1983.

Solomon v. City of Gainesville, 796 F.2d 1464 at 1466 (11th Cir. 1986); see Mantolete v. Bolger, 791 F.2d 784 (9th Cir. 1986); Rivera v. City of Riverside, 763 F.2d 1580, 1582 (9th Cir. 1985), affirmed City of Riverside v. Rivera, _____ U.S. _____, 106 S.Ct. 2686 (1986); Fast v. School Dist. of City of Ladue, 728 F.2d 1030, 1033-34 (8th Cir. 1984) (en banc). A review of some of these cases will indicate the basis of these holdings and how this approach comports with the legislative history of Section 1988.

In Coalition for Basic Human Needs v. King, 691 F.2d 597 (1st Cir. 1982), plaintiffs sought to have the District Court compel state officials to resume AFDC payments which had been suspended because of a legislative battle over the state budget. The District Court denied a temporary restraining order but on appeal the Circuit Court granted an injuction pending appeal. A budget was subsequently passed prior to the effective date of

the Circuit Court's injunction. The Circuit Court allowed attorney's fees even though the injunction never went into effect based on the fact that some of the benefits sought was to obtain preliminary relief and that by obtaining this relief the plaintiffs had succeeded on a significant issue of litigation. In so holding, the First Circuit took specific note of the case of Williams v. Alioto, 625 F.2d 845 (9th Cir. 1980) (per curiam), cert. denied, 450 U.S. 1012 (1981), where the Court awarded attorney's fees in a situation where the District Court preliminarily enjoined certain police procedures following a judicial determination of unconstitutionality even though the case had been mooted before the police could complete an appeal of the injunction. The First Circuit noted that attorney's fees were even more appropriate in King since the success on the significant issue had occurred at an appellate level. In the present case, the success on the

significant issue not only occurred at the appellate level but the Attorney General consciously chose not to contest the Third Circuit's holding in their Petition for Certiorari to this Court.

In Solomon v. City of Gainesville, supra, an individual brought an action under 42. U.S.C. Section 1983 seeking declaratory and injunctive relief. The District Court entered summary judgment for the defendants, however, the Circuit court on appeal declared that the City Sign Ordinance violated plaintiff's first amended rights. While no formal declaratory judgment was entered and Solomon waived his Section 1983 damages claim on appeal, the Circuit Court held that Solomon was a prevailing party because he had on appeal established a right secured by the Constitution. Id. at 1466. See Solomon v. City of Gainesville, 763 F.2d 1212 (11th Cir. 1985).

In Fast v. School Dist. of City of Ladue, supra, 1033-34 (8th Cir. 1984) (en banc), the

teacher brought a suit, individually, claiming that she was constitutionally entitled to a pre-termination hearing. Id. at 1031. The District Court rejected plaintiff's claim but declared that defendants had violated plaintiff's due process rights and that plaintiff was entitled to a post-layoff hearing. Id. at 1033. The plaintiff had no interest in such a hearing and, therefore, did not avail herself of it. The District Court, however, denied attorney's fees and the plaintiff appealed. The Eighth Circuit in reversing the District Court stated:

> Furthermore, even if the Complaint is read not to request a post-layoff hearing, the District Court held that the Plaintiff was entitled to such a procedure and the failure to afford it was unconstitutional.
>
> ...
>
> The relief secured here was not insignificant. First of all, the simple holding that the board has deprived Plaintiff of her property without due process of law, in and of itself, is an important vindication of constitutional rights. When public officials violate the rights of citizens, and courts so declare, an important deterrent effect results. Other public officials are less likely to violate

> other citizens' rights in the future. The specific relief obtained, in addition, tends quite substantially to reduce the likelihood of future arbitrary conduct by public employers.

Id. at 1033. What the Eighth Circuit quite properly realized was that the very practical results and benefits of having actions declared unconstitutional:

> ...is that a standard of conduct is laid down which will in the future benefit all persons in a situation similar to Plaintiff's.

Id. at 1034. As one Court noted, given this very important purpose of having constitutional rights declared:

> The award of counsel fees is not intended to punish the Defendant in any way. Rather, it is to permit and encourage Plaintiffs to enforce their civil rights. To declare those rights while simultaneously denying the award of fees would seriously undermine the declared congressional policy.

Perez v. University of Puerto Rico, 600 F.2d 1 at 2 (1st Cir. 1979). In fact, the vindication of

fundamental rights is not only a significant issue, but the most significant issue in the litigation in light of the congressional policy behind the award of attorney's fees. As noted by one court in awarding attorney's fees, plaintiffs:

> "succeeded on the most significant issue of the litigation--they proved that their civil rights had been violated..."

Rivera v. City of Riverside, 763 F.2d 1580 at 1582 (9th Cir. 1985), aff'd. City of Riverside v. Rivera, supra.

The approach of the Circuit Courts in the above opinions is further supported by the cases cited in the legislative history of Section 1988. The Senate Report cited Mills v. Electric AutoLite Company, 396 U.S. 375 (1970) for the proposition that attorney's fees are appropriate where a party has prevailed on an important matter in the course of litigation. In Mills, this Court held that attorney's fees were appropriate where a plaintiff succeeded in establishing a cause of action even

though the plaintiff may ultimately not be entitled to any relief. This Court made the following statement in support of its holding:

> Nevertheless, the stress placed by Congress on the importance of fair and informed corporate sufferage leads to the conclusion that, in vindicating the statutory policy, Petitioners have rendered a substantial service to the corporation and its shareholders.

Id. at 397. As discussed earlier, the stress by Congress and the legislative history was upon the vindication of basic federal, constitutional, and statutory rights and the benefit which inures to all citizens from the vindication of these rights. As noted by this Court in a very apt quotation:

> "If a citizen does not have resources, his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers." 122 Cong. Rec. 33313 (1976) (remarks of Sen. Tunney).

City of Riverside v. Rivera, supra, 106 S.Ct. at 2695. It would be an interesting commentary on

the values of our congressional policies were we to be so readily willing to recognize the importance of awarding attorney's fees for the vindication of congressional policy for fair and informed corporate sufferage but not willing to recognize the award of counsel fees for the vindication of fundamental constitutional rights which benefit not shareholders but society as a whole.

In support of their statement that a party may prevail when they "vindicate rights" without formally obtaining relief, the legislative history cites numerous cases. Among these cases is Richards v. Griffith Rubber Mills, 300 F.Supp. 338 (D. Ore. 1969). In Richards plaintiff brought a claim under Title VII for sex discrimination. The defendant, not by choice, but because of state regulations, could not hire a woman for the job which she sought. Because the employer acted in good faith reliance upon a state regulation, the

Court found that it could not award relief. The Court found, however, that the plaintiff should be entitled to attorney's fees for establishing a violation of the act. Again, as in Mills, fees are awarded not for formal relief but because of the vindication of the statutory policy. While Petitioners suggest that other cited cases such as Kopet v. Esquire Realty Co., 523 F.2d 1005 (2nd Cir. 1975) and Thomas v. Honeybrook Mines, Inc., 428 F.2d 981 (3rd Cir. 1970) should be limited to the fact that they conferred a benefit upon a class, there is absolutely nothing in the legislative history which indicates that they were in any way being cited for this proposition. The sentence which they are cited in support of reads as follows: "Moreover, for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." Rather, these cases reflect the intent

of Congress to indicate that under Section 1988, just as under other areas of federal law involved in the cited cases, attorney's fees should be awarded for the vindication of the rights expressed in the congressional policy even though no formal relief has been obtained. The Kopet Court, after discussing this Court's holding in Mills, stated:

> Here, similarly, it appears that appellant rendered a service to the partnership by vindicating the statutory policy against unregistered offerings. Esquire benefited from appellant's action both in arresting the existing violation of the law and in the deterrent effect which it may be assumed the action will have on the future conduct of Esquire management.

Kopet v. Esquire Realty Co., supra at 1008. Paraphrasing the above quote it could be said in the present case that here, similarly, it appears that the Respondent rendered a service to the state by vindicating the statutory policy against the deprivation of due process rights. The state

benefited from Respondent's action both in arresting an existing violation of the Constitution and in the deterrent effect which it may be assumed the action will have on the future conduct of the state officials. The thrust of all these cases, including those cited in the legislative history is the vindication of statutory rights which Congress has expressly stated are of importance. Vindication of these rights by the individual furthers an imporant congressional policy and Congress has, therefore, determined that it is appropriate to award attorney's fees even where the rights have been vindicated without formally obtaining relief.

III. THE CIRCUIT COURT CORRECTLY CONCLUDED THAT THE PRESENT CASE SHOULD BE REMANDED FOR DETERMINATION OF WHETHER RESPONDENT'S LAWSUIT WAS A CATALYST IN CAUSING THE PETITIONERS' UNCONSTITUTIONAL PRACTICES TO CHANGE.

As the Third Circuit correctly noted in its Opinion, attorney's fees may be awarded where the plaintiff's lawsuits acts as a catalyst which causes changes in the defendant's past practices even though no direct relief was obtained. Even where a party has received no judicial relief, Fields v. City of Tarpon Springs, Fla., 721 F.2d 318 (11th Cir. 1983); Rutherford v. Pitchess, 713 F.2d 1416 (9th Cir. 1983), or different relief than that requested in the complaint, Institutionalized Juveniles v. Sec. of Pub. Wel., 758 F.2d 897 (3rd Cir. 1985); Fast v. School Dist. of City of Ladue, supra, a plaintiff may be considered to have prevailed for purposes of Section 1988.

> Under Section 1988, the focus is on the relief received rather than any formal procedural labels.

Morrison v. Ayoob, 627 F.2d 669 at 671 (3rd Cir. 1980). In determining whether a party is prevailing:

> The focus of this analysis is on the relief actually obtained rather than on the success of legal theories.

Institutionalized Juveniles v. Sec. Publ. Wel., supra at 911.

In Fields v. City of Tarpon Springs, Fla., supra, plaintiffs brought a suit claiming that the city racially discriminated in capital expenditures for city parks. The federal agency involved in funding conducted an investigation and specifically found no racial discrimination. Plaintiffs subsequently voluntarily dismissed their complaint but requested attorney's fees because the parks in minority areas had, in fact, changed. The District Court after an extensive hearing awarded attorney's fees. The Eleventh Circuit, in upholding the District Court, focused upon the necessity of looking to the practical

relief obtained and not whether the issue of discrimination was litigated or compromised. The Court stated:

> ...that a requisite causal connection is gauged by the "nature of the relief obtained, the chronology of events and the role of the civil rights action in activating the change." Robinson v. Kimbrough, 652 F.2d 458 at 466 (5th Cir. 1984).

Fields v. City of Tarpon Springs, Fla., supra at 321. The Fields Court noted that while there had been no compromise, settlement or legal determination, other than the federal agency determination which was favorable to the defendants, the parks had, in fact, changed after the filing of the lawsuit. The Court, therefore, upheld the award of attorney's fees stating:

> The catalyst test for fees only requires a causal connection between the lawsuit and some actual changes effected.

Id. at 322. In so holding, the Eleventh Circuit recognized that the purposes of the Civil Rights Act can only be served if fees are awarded when

"practical relief has been obtained that is factually a causal result of the lawsuit." Id. at 321.

In Rutherford v. Pitchess, supra, the plaintiff had received an earlier order requiring jail officials to make constitutional improvements. Subsequently, plaintiff brought an action for contempt sanctions and modification of the earlier decree. The Court denied plaintiff's contempt and modification motions and, in fact, granted defendant's modification motion. Plaintiff then filed a motion seeking attorney's fees for work done on the contempt and the modification proceedings. While the Court found that plaintiff was not entitled to any of their requested relief, the Court found that the bringing of the contempt motion had an impact on defendant's subsequent good faith compliance with the earlier judgment. The Ninth Circuit, just as the Eleventh Circuit, focused on the practical

result of the plaintiff's action and not his entitlement to relief.

> ...[P]laintiffs were entitled to attorney's fees under Section 1988 because of the causal relationship between the litigation brought and the practical outcome realized.

Id. at 420. The Ninth Circuit, just as the Eleventh Circuit, recognized that causation of a practical result, not formal relief or a judicially determined entitlement, must be a key factor in determining whether to award attorney's fees if civil rights are to be meaningly enforced. See also Gekas v. Atty. Registration and Disciplinary Com'm., 793 F.2d 846, 851 (7th Cir. 1986) (no showing of any judicial relief or entitlement in federal court but lawsuit found to be causally linked to advancement of already planned state action); Ridgeway v. Montana High School Ass'n., 638 F.Supp. 326 (D. Mont. 1986). (The only claim pressed by the plaintiff was that of the discriminatory scheduling of sports.

Attorney's fees had been previously awarded based on a consent decree which dealt with the general discriminatory policy of the high school systems. The Court found that there was no showing of discriminatory scheduling. It also found that there generally still existed discriminatory treatment of female sports. Despite the failure of plaintiffs on their specific claims pressed, the Court awarded fees because the plaintiffs had in fact succeeded on the general thrust of their claim.)

Again, the approach of the above Circuit Courts, including the Circuit Court below, is strongly supported by the cases cited in the legislative history of Section 1988. In Thomas v. Honeybrook Mines, Inc., 428 F.2d 981 (3rd Cir. 1970), the plaintiffs brought a suit attempting to force their union to collect delinquent payments. This suit was dismissed on jurisdictional grounds and the dismissal was

affirmed by the Circuit Court. Id. at 984. However, while there was absolutely no judicial determination at all or showing of entitlement to relief in the plaintiffs' lawsuit, the Court took note of the fact that three days before the argument on the appeal of the dismissal of the plaintiffs' lawsuit the union filed a complaint against one of the mines. The Court therefore determined that the plaintiffs should be awarded attorney's fees for rendering services which in fact caused the union to change their approach. This case like the earlier discussed cases cited in the legislative history was cited specifically for the fact that attorney's fees should be awarded when an individual vindicates rights without formally obtaining relief. The focus is obviously not upon the legal entitlement to relief, but upon the fact that the lawsuit three days prior to it being finally dismissed on appeal, in fact caused the change in the defendant's practices. In the instant case, in a

similar manner to Honeybrook Mines, the state officials in fact promulgated regulations prior to the upholding of the dismissal on appeal. These regulations specifically addressed the use of hearsay reports based on information supplied by confidential informants in prison disciplinary proceedings. These regulations closely track the minimum procedures which the Circuit Court had specifically stated must be followed if constitutional rights are not to be violated. As a result, Respondent's lawsuit in an almost classic example of the "private attorney general" concept, vindicated not only his own constitutional rights but the rights of all other prisoners who would in the future be subject to Petitioners' procedures before prison tribunals. By doing so in a manner which did not involve the federal court system in direct regulation or oversight of state officials, Respondent's lawsuit beautifully accommodated the concepts of federalism which this Court has recognized as

being of significant importance. Steffel v. Thompson, 415 U.S. 452 (1974) (concurring Opinion of Justice Rehnquist). While it has been argued that attorney's fees should not be awarded for what is allegedly a gratuitous change in policy, this argument ignores what is meant by gratuitous in the context of attorney's fees. Gratuitousness deals with a situation where even though the policies or practices were changed, the plaintiff's claims wre frivolous, unreasonable, or groundless. Lovell v. City Kankake, 783 F.2d 95 at 97 (7th Cir. 1986). In the present case, Respondent's claims of unconstitutionality were not frivolous, unreasonable, or groundless but specifically held to be true.[3]

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[3]While the Amicus Curiae suggests that Respondent has somehow failed to prove that his lawsuit was an important factor in causing promulgation of the regulations, it must be noted that Respondent has continuously sought to have a hearing in which he could offer such proof, however, such hearing was denied by the District Court. The Third Circuit did not hold that

IV. THE COURT WAS CORRECT IN FINDING THAT RESPONDENT COULD BE A PREVAILING PARTY BASED UPON THE DECLARATION OF HIS CONSTITUTIONAL RIGHTS.

The Petitioners argue that because there is no extant case or controversy, Respondent was not entitled to a declaratory judgment and therefore could not be considered a prevailing party. While Respondent, as will be discussed infra, does not agree with this reasoning on declaratory judgments, there is simply no need for this Court to even reach this issue.

As discussed earlier, Respondent was a prevailing party based upon the fact that he succeeded upon a significant issue in the litigation and achieved the very real and important benefit of having his constitutional rights vindicated--a vindication of rights through a specific appellate court ruling which ruling not only could promote the congressional

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Respondent's suit was in fact a catalyst but merely remanded to the District Court for a hearing on this issue.

policy behind Section 1988 but which ruling in fact led to the promulgation of regulations in keeping with the Court's declaration.

There can be absolutely no question that the appellate court had the power to declare the the Petitioners' actions and practices were in violation of the due process clause of the Fourteenth Amendment.

The Petitioners' assertion that Hanrahan v. Hampton, 446 U.S. 754 (1980), would preclude attorney's fees in the present case is simply an inaccurate reading of the holding in Hanrahan. In Hanrahan there simply had been no determination of the "substantial rights of the parties". The reversal of the directed verdict had not involved in any way a vindication of constitutional rights or a declaration of any rights. The Opinion merely found that there was a sufficient factual dispute to avoid the entry of a directed verdict. See, Mantolete v. Bolger, 791 F.2d 784, 787

(9th Cir. 1986) (specifically discussing the limited basis of the holding in Hanrahan); Harris v. McCarthy, 790 F.2d 753, 757 n. 3 (9th Cir. 1986) (same).

As to the power of the Court to declare that Respondent's constitutional rights have been violated, this Court has long held that such a determination is proper where declaratory relief has been requested along with a damage claim. Powell v. McCormack, 395 U.S. 486 (1969); Wolff v. McDonnell, 418 U.S. 539 (1974).

In Powell v. McCormack, supra, Congressman Powell asserted a claim for back pay for the time during which he was not seated in the 90th Congress and also sought a declaration that the House resolution which lead to his not being seated and receiving salary was unconstitutional. The respondents claimed that Powell's claim for declaratory relief should be dismissed as moot since the 90th Congress had been dissolved and

because Powell had been seated in the 91st Congress. The Court's ruling was based soley on the individual claims of Powell and specifically did not address the mootness issue as to other parties. In finding that the claim for back pay and declaratory relief should not be dismissed as moot, this Court stated the following:

> Furthermore, even if Respondents are correct that Petitioner's averments as to injunctive relief are not sufficiently definite, it does not follow that this litigation must be dismissed as moot. Petitioner Powell has not been paid his salary by virture of an allegedly unconstitutional House resolution. That claim is still unresolved and hotly contested by clearly adverse parties. Declaratory relief has been requested, declaratory judgment can then be used as a predicate to further relief.

Id. at 499-500. This Court went on to declare that the House resolution was unconstitutional and remanded the case with instructions to enter a declaratory judgment. This declaratory judgment was permissible because of the still unresolved and hotly contested clearly adverse interests of Petitioner Powell and respondents concerning his wage claim. In Petitioners' cited cases of

Golden v. Zwickler, 394 U.S. 103 (1960), Ashcroft v. Mattis, 431 U.S 171 (1977) (per curiam), Green v. Mansour, No. 84-6270 December 3, 1985), 106 S.Ct. 423 (1985) and Carbolan v. Vaughn, 750 F.2d 662 (5th Cir. 1985), there was simply no question of declaratory relief being requested with an unresolved and hotly contested claim for damages. In Zwickler, not only was there no request for damages, but the record demonstrated that Zwickler's "sole concern" was literature relating to an individual congressman and his record and that it was highly unlikely that this congressman, who had subsequently been appointed a judge, would ever again run for office. There was therefore no claim still unresolved and hotly contested by clearly adverse parties such as exists where a damage remedy is sought. In Ashcroft v. Mattis, the damage claim had been dismissed and therefore the only issue before this Court was whether a petitioner who had no other

claim or interest could seek declaratory relief. The case of Mansour v. Green, supra, is also distinguishable on the basis that no damage relief was sought. Further, in Mansour plaintiffs claimed that the state officials' calculation of benefits under the Aid for Dependent Children Program violated federal law. During the pendency in the District Court, Congress changed some of the relevant provisions of the AFDC Program. There was no argument that this change was the result of the lawsuit. The respondent thereafter brought state policy into compliance with the new federal regulations. While a preliminary injunction was originally granted on one of petitioner's claims, this preliminary injunction was terminated while the matter was pending on the merits. The claims were therefore dismissed because the state's practices were fully in compliance with the federal law. This Court found that the entry of declaratory judgment would be inappropriate since

its only potential purpose was to serve as res judicata for state damage claims and that even if it could potentially so serve, this would be a violation of the principles of federalism and the Eleventh Amendment.[4] The focus of the decision in Mansour was on the Eleventh Amendment which has not even been raised or argued by the Petitioners and is therefore not an issue in this case. The entry of declaratory judgment in Mansour could serve as a predicate to absolutely nothing and there was, therefore, no present dispute between adverse parties such as existed in Powell and other cases where declaratory relief was sought in combination with a claim for damages.

As to the award of attorney's fees for

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[4]As this Court stated "if, of course, petitioners would make no claim that the federal declaratory judgment was res judicata and later commenced proceedings, the declaratory judgment would serve no purpose whatever in resolving the remaining dispute between the parties, and is unavailable for that reason." Id. at _____ U.S. _____, 106 S.Ct. at 428. n. 2.

declaratory relief where asserted immunity exists, there is nothing to indicate that such an award would in any way be improper. In Pulliam v. Allen, supra, this Court specifically allowed an award of attorney's fees against a judge who was absolutely immune from damage relief. In so holding, this Court took specific note of the citation in the House Report of Pierson v. Ray, 386 U.S. 547 (1967), with reference to the passage in the report which states that Congress intended that:

> ...an attorney's fee award be available even when damages would be barred or limited by "immunity doctrines and special defenses available only to public officials." H.R. Rep. No. 94-1558, p. 9 (1976).

Pulliam v. Allen, supra, at 1982. It must be noted that Pierson v. Ray, supra, dealt not only with judicial immunity but also good faith immunity of police officers. It would be an anomalous result if only such liability could exist in a situation of absolute immunity and be

more limited to situations of mere good faith immunity especially when Pierson specifically dealt with both situations.

While Petitioners argue that Kentucky v. Graham, No. 84-849 (June 28, 1985), 105 S.Ct. 3099 (1985) would preclude an award of attorney's fees based upon declaratory relief, Graham can be readily distinguished upon its facts. In Graham, the plaintiffs sought only money damages against the defendants in their individual capacities. The state was not only not a party but had specifically refused to defend any of the individual defendants and refused to pay expenses. The state had in fact been specifically dismissed from the case and was not notified or involved in negotiations which led to settlement. In the present case, Respondent's suit was brought against Petitioners in their official and individual capacities and has specially sought declaratory relief. Further, the state has in

fact been the party litigating this case at all times and never once challenged the official capacity claimed or the declaratory relief sought as being unavailable in this case. While Petitioners also argue that Harlow v. Fitzgerald, 457 U.S. 800 (1982) would prevent the award of attorney's fees, Harlow does not in any way stand for such a proposition and in fact had nothing to do with an award of attorney's fees. On the specific subject of declaratory relief, this Court in Harlow was careful to "emphasize" that:

> We express no view as to the conditions in which injunctive or declaratory relief might be available.

Id. at 819 n. 34. However, as discussed earlier, in the case of Pulliam v. Allen, supra, this Court specifically allowed attorney's fees in a case involving absolute judicial immunity. It should be noted that over the seven-year course of this litigation, it is the state Attorney General who has conducted this litigation

and has satisified an earlier judgment for costs awarded by the Third Circuit. Also, as in Brandon v. Holt, _____, U.S. _____, 105 S.Ct. 873 (1985), this case from its inception was brought against the petitioners in their official capacity and not once has the Attorney General sought to have this suit dismissed as to the official capacity of the claims asserted. In this regard, as this Court noted in Hutto v. Finney, 437 U.S. 678 (1978), allowing the state to avoid liability for attorney's fees "would be a remarkable way to treat individuals who have relied on the Attorney General throughout the litigation." Id. at 692 n. 19; see also, Williams v. Thomas, 692 F.2d 1032 (5th Cir. 1982) (attorney's fees awarded where constitutional violation was found and defendants were acting in their official capacities). As this Court also noted in Hutto, the legislative history of Section 1988 makes it abundantly clear that Congress intended "to authorize fee awards

fact been the party litigating this case at all times and never once challenged the official capacity claimed or the declaratory relief sought as being unavailable in this case. While Petitioners also argue that Harlow v. Fitzgerald, 457 U.S. 800 (1982) would prevent the award of attorney's fees, Harlow does not in any way stand for such a proposition and in fact had nothing to do with an award of attorney's fees. On the specific subject of declaratory relief, this Court in Harlow was careful to "emphasize" that:

> We express no view as to the conditions in which injunctive or declaratory relief might be available.

Id. at 819 n. 34. However, as discussed earlier, in the case of Pulliam v. Allen, supra, this Court specifically allowed attorney's fees in a case involving absolute judicial immunity. It should be noted that over the seven-year course of this litigation, it is the state Attorney General who has conducted this litigation

and has satisified an earlier judgment for costs awarded by the Third Circuit. Also, as in Brandon v. Holt, _____, U.S. _____, 105 S.Ct. 873 (1985), this case from its inception was brought against the petitioners in their official capacity and not once has the Attorney General sought to have this suit dismissed as to the official capacity of the claims asserted. In this regard, as this Court noted in Hutto v. Finney, 437 U.S. 678 (1978), allowing the state to avoid liability for attorney's fees "would be a remarkable way to treat individuals who have relied on the Attorney General throughout the litigation." Id. at 692 n. 19; see also, Williams v. Thomas, 692 F.2d 1032 (5th Cir. 1982) (attorney's fees awarded where constitutional violation was found and defendants were acting in their official capacities). As this Court also noted in Hutto, the legislative history of Section 1988 makes it abundantly clear that Congress intended "to authorize fee awards

payable by the states when the officials are sued in their official capacities." Id. at 693-94. The fact that Respondent specifically sought declaratory relief from the Circuit Court which entered this declaration; the fact that Petitioners did not at any time seek dismissal of the official capacity claimed in this suit; the fact that the Attorney General alone has conducted this litigation throughout its over six-year history; should prevent the state from now arguing that the attorney's fees for this official capacity suit could not be paid by the state but by the individual defendants. Rather, they should be considered to have waived this argument by their participation and conduct over the course of this litigation.

V. IT WAS PROPER FOR THE THIRD CIRCUIT TO AWARD RELIEF BASED SPECIFICALLY UPON THE ENTRY OF DECLARATORY RELIEF.

While Respondent does not feel that this Court need reach the issue of whether a per se declaratory judgment was or could be entered in the present case, Respondent does feel that it would be proper for the Circuit Court to consider its holding as representing, in fact, a declaratory judgment. Declaratory judgments have been recognized as having been entered where not expressly so stated. Solomon v. City of Gainesville, 763 F.2d 1212 (11th Cir. 1985); Solomon v. City of Gainesville, 796 F.2d 1464 (11th Cir. 1986) (attorney's fees awarded for a declaration of unconstitutionality where in fact no declaratory judgment was specifically entered). While Petitioners suggest that the City of Los Angeles v. Lyons, 461 U.S. 95 (1983), would prevent the entry of a declaratory judgment, Respondent submits that a logical reading of this

case in light of Powell v. McCormack, supra., Pulliam v. Allen, supra, and the function of declaratory judgments would indicate otherwise. In Lyons, the damage claim of Respondent had been severed from his claim for equitable relief. Id. at 106. The plaintiff sought injunctive relief which would enjoin the City from using the choke hold policy involved. This Court found that injunctive relief could only be had if the plaintiff demonstrated "a personal stake in the outcome" and that past exposure to illegal conduct did not in itself show a present case or controversy regarding injunctive relief. Id. at 103. There is a reasoned distinction to be made between injunctive and declaratory relief with regard to the issue of case or controversy. An injunction by its nature specifically prohibits future conduct where the plaintiff has demonstrated that he is in immediate danger of suffering future injury. Where it is speculative

that "he will again experience injury as the result of that practice even if continued", the plaintiff does not have a personal stake in the outcome of the decision to prevent a choke hold from being used on other individuals. In contrast, a declaratory judgment as to a continuing policy or practice should not necessitate a finding that the individual immediately might sustain a direct injury since whether or not this in fact is present, the relief, declaration of unconstitutionality, will be precisely the same. If a policy is unconstitutional once, it becomes no less unconstitutional a second time and the "personal stake in the outcome" which assures concrete adverseness is exactly the same. There is in fact nothing speculative about the determination. An injunction in contrast seeks not a declaration but the prohibition of future conduct as it applies to the individual. Therefore, in order for the

individual to have a personal stake in the outcome of the determination, he must be specifically subject to the future conduct. Unlike the declaratory relief involved in Powell and the present case, there is simply no reason to make a determination as to injunctive relief unless the individual will again experience injury as a result of the practice.

Such an approach to a differentiation between declaratory and injunctive relief not only comports with logic but is fully in consonance with this Court's pronouncements on the nature of declaratory relief.

> A declaratory judgment is simply a statement of right, not a binding order supplemented by continuing sanctions.

Steffel v. Thompson, 415 U.S. 452 at 483 (concurring Opinion of Justice Rehnquist). This exact same simple statement of rights occurs where declaratory relief is sought along with damages as well as where declaratory relief is sought without

a claim for damages such as in Steffel v. Thompson, supra. While the basis of the case or controversy which leads to the entry of the declaratory judgment may be different, the case or controversy nonetheless exists and the practical effects of the judgment which arises from the respective case or controversy is exactly the same. Further, such an approach to declaratory relief fully comports with the recognition of federal authority and a "proper balance between state officers engaged in the administration of the state's laws." In both cases the declaration is only persuasive and not coercive and as discussed earlier, benefits the state by putting it on notice of a violation and allowing it to voluntarily pursue the relief which the state feels is appropriate.

> All these possible avenues of relief would be reached voluntarily by the States and would be completely consistent with the concepts of federalism discussed above.

Steffel v. Thompson, supra at 485.

Yet, despite the fact that the declaratory relief involved in the present case functions in exactly the same way as declaratory relief in a class action, concerning the same practices, the Petitioners would urge this Court to require the institution of class actions and the seeking of injunctive relief in order to make the exact same resolution meaningful for purposes of the award of attorney's fees. This approach hardly comports with the manner in which Congress has stated that the courts should apply the provisions of Section 1988.

> In the civil rights area, Congress has instructed the courts to use the broadest and most effective remedies available to achieve the goals of our civil rights laws.

1976 U.S. Code Cong. Ad. News at 5910-11. Such an approach has the substantial negative effect of burdening the court system with unnecessary class

action proceedings[5] and supervision and with requiring a greater intrusion through injunctive relief unto the state's administration of their laws and regulations, and it adds this burden without any substantial benefit to any of the parties involved.

---

[5]In the recent case of Evans v. Jeff D., _____ U.S. _____, 106 S. Ct. 1531 (1986) this Court took note of the fact taht of the 10,757 other civil rights cases filed in the courts, most of which were Section 1983 cases, only 111 were class actions. The Petitioner's approach would require plaintiffs to drastically alter this equation and burden the court with needless hearings upon and determination of the propriety of class actions as well as class action supervision if the plaintiffs desire to obtain counsel to vindicate their consitutional rights. Id. at 1543 n.30

VI. THERE HAS BEEN NO QUESTION PRESENTED TO THIS COURT AS TO THE LIMITATION OF ATTORNEY'S FEES.

Amici curiae, National Governor's Association, et al, has raised the issue that Respondent's attorney fee award should be narrowly limited. Respondent would simply point out that he has never requested attorney's fees except for the significant issue on which he has prevailed. Respondent in fact requested from the District Court attorney's fees for 76 1/4 hours spent in vindicating his rights through a District Court and appellate process. While Respondent recognizes that Petitioners did not raise this issue, Respondent did not want the Court to be mislead into believing that Respondent was seeking to use the attorney's fees award act to obtain any exorbitant fee. Rather, Respondent has in keeping with this Court's decision in Hensley v. Eckerhart, supra, attempted to avoid a second major litigation by confining his fee request to a very limited number of hours.

CONCLUSION

For the above stated reasons, the decision of the Court of appeals for the Third Circuit should be affirmed and case remanded to the District Court for determination of attorney's fees.

Respectfully submitted,

JOHN M. HUMPHREY
ROBERT H. VESELY
161 West Third Street
P.O. Box 215
Williamsport, PA 17701
(717) 323-8711

Attorneys for Respondent

NO. 85-1630

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1985

Supreme Court, U.S.
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CLERK

LOWELL D. HEWITT, Superintendent;
B.B. KYLER, C.O. III;
R.E. STOTELMYER, Major;
B.K. SMITH, Counselor III;
K.R. HILEMAN, Farm Manager;
D.R. ERHARD, Deputy Superintendent
for Treatment; T.W. HENRY,
Director of Treatment;
W. MATEER, C.I. Manager,
Petitioners

v.

AARON HELMS,
Respondent

On Writ of Certiorari to the
United States Court of Appeals
For the Third Circuit

REPLY BRIEF FOR PETITIONERS

LeROY S. ZIMMERMAN
Attorney General

THOMAS G. SAYLOR, JR.
First Deputy Attorney General

ANDREW S. GORDON
Chief Deputy Attorney General
Chief, Litigation Section

GREGORY R. NEUHAUSER
Senior Deputy Attorney General

Office of Attorney General
Commonwealth of Pennsylvania
15th Fl., Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

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Civil Rights Attorneys Fees
Awards Act, 42 U.S.C.
§ 1988..... 1

IN THE SUPREME COURT
OF THE UNITED STATES

NO. 85-1630

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v.

AARON HELMS,

Respondent

On Writ of Certiorari to the
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For the Third Circuit

REPLY BRIEF FOR PETITIONERS

In our opening brief, we argued that the Civil Rights Attorneys Fees Awards Act, 42 U.S.C § 1988, requires that a civil rights plaintiff, or those whom he represents in a class action, secure some relief in order to be a prevailing party entitled to an award under the Act. Since respondent did not

receive any relief in this litigation, we argued that it was error for the Court of Appeals to find him to be a prevailing party. Our premise is straightforward: in this action, Helms sought damages, injunctive relief and a declaratory judgment, all on his behalf alone. Since petitioners were found to be immune from damages, since Helms received no injunction, and since neither the Court of Appeals nor the District Court entered -- or could have have entered -- a declaratory judgment, this action provided no benefit to respondent. In addition, we argued that to award fees to such a plaintiff despite his lack of success would undermine the qualified immunity defense for government officials and unnecessarily encourage spiraling litigation to avoid the possibility of an assessment of fees

-- an especially undesirable result where, as here, the continued litigation has no effect on the relief available on the plaintiff's substantive claims.

Respondent has presented several arguments, most of which have been addressed in our principal brief. A few contentions, however, warrant a reply.

I. THE LACK OF SUCCESS

In opposition to our argument that Helms should not be regarded as a prevailing party since he obtained no benefit from this litigation, Helms advances two primary contentions: 1) that he sought relief not only against the wrong allegedly done to him personally but also against the general "policies" of petitioners, and 2) that a

statement of law in a court's opinion -- irrespective of the effect on the litigants -- is sufficient "vindication" to qualify as a benefit entitling respondent to fees under the Attorneys Fees Awards Act. Upon scrutiny, neither contention is supportable.

A. In the first place, Helms' argument to the contrary notwithstanding, this case was not brought as a general attack upon the Pennsylvania policies on inmate discipline or disciplinary procedures. The complaint clearly discloses that the action was brought only to redress what Helms believed was a violation of his personal right to due process in connection with his own disciplinary hearing. (J. App. 18a-19a) He sought a declaratory judgment that his rights were violated, an injunction reversing his disciplinary

conviction and expunging his inmate file, and damages from petitioners for their having found him guilty of the prison misconduct. (J. App. 19a-20a) Nowhere did Helms mount a broad-based attack against the constitutionality of state policies nor did he seek relief on behalf of a class of persons confined to state prison. (J. App. 7a-8a) Thus, it is particularly disingenuous for respondent to argue that his "primary interest" (Resp. Br. p. 11) in bringing the litigation was to pursue what he now calls "the most significant issue" (Resp. Br. p. 17) -- a general attack on the state's policies.[1] The record simply fails to support Helms' position.

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[1]Respondent also relies on the fact that his complaint contained a request for "such other relief as may be

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Indeed, the record discloses that Helms offered absolutely no proof in his summary judgment motion in the District Court on the general policies of inmate discipline. Instead, what was before the District Court and what the Court of Appeals determined on Helms' first appeal was simply the sufficieny of the evidence used to find Helms quilty of the prison misconduct. Nowhere did he allege, much less prove, that state policies in general were unconstitutional. (See Motion for Summary

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(FOOTNOTE CONTINUED)

necessary and proper." (J. App. 20a-21a) If such a generalized request is sufficient to overcome the case or controversy requirements of Article III and preserve a claim for personal benefit, certainly there would be no need for a plaintiff to plead for damages, an injunction or a declaratory judgment, but instead simply rely on the court to fashion his relief. Certainly, this cannot be correct.

Judgment dated May 9, 1980) Thus, the "declaration" of the Court of Appeals relied upon by respondent for his vindication benefited no one, including Helms.

B. On respondent's second contention with respect to his claimed success, Helms apparently is confusing the concept of non-formal success with personal benefit. There can be no quarrel, of course, with the proposition that a party may be considered prevailing "without formally obtaining relief." Maher v. Gagne, 448 U.S. 122, 179 (1980); S. Rep. 94-1011, p. 5. As the Solicitor General points out (Br. for United States, p. 8), the legislative history shows that the distinction Congress drew was between formal

relief, e.g., judgment or injunction, and informal relief, e.g., settlement or consent decree. This is materially different from the concept of personal benefit, since a personal benefit could be either formal or informal, but relief--in whatever form it takes--may not necessarily create a benefit for the litigant.

The latter situation is precisely the case here, for as we demonstrated in our principal brief, respondent achieved none of the benefit he sought in bringing this suit. See Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). He was awarded no damages, no injunction was ever entered, and the need for other equitable relief had been rendered moot by the time the Court of Appeals issued its statement of the law on prisoner due process.

Helms appears to suggest that our position cannot be correct because, in his view, it would foster unnecessary class actions in order to prevent a named party's claim from becoming moot in the course of the litigation. Obviously, if respondent had intended to challenge the state's procedures generally, he could have done so with or without class certification, assuming, of course, that he possessed the required standing. That Helms chose not to pursue a class action or an attack on the constitutionality of the procedures in general should not run to the detriment of petitioners.[2] His equitable

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[2]In fact, there was no proof that petitioners had any prescribed procedures or standards for assessing information provided by confidential informants. Certainly, the Court of Appeals said no more than the quantum of evidence produced at respondent's disciplinary hearing was insufficient to sustain the misconduct charges.

claims were rendered moot. Surely, the question of fees should not depend on what kind of an action a plaintiff could have pursued but elected not to.

Much of respondent's brief is devoted to a discussion of the value of the "private attorney general" concept which underlies the Attorneys Fees Awards Act. There can be no question that this concept represents a legislative expression of the incentive necessary to encourage private parties to pursue civil rights actions or that this policy is one that Congress considered of great importance. City of Riverside v. Rivera, No. 85-224 (June 27, 1986), slip op. at 12. This expression of legislative intent, however, must be read with the overlay of

Article III of the Constitution and this Court's repeated concern that entitlement to fees not be divorced from the merits of the claims. Awarding fees where a litigant obtains a benefit for a party is consistent with the private attorney general concept; awarding them for a plaintiff's avowed assertion of the rights of future non-parties is not.[3]

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[3]Helms' strong reliance upon Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), is misplaced. Respondent suggests that Mills stands for the proposition that attorney's fees are appropriate where a plaintiff succeeds "in establishing a cause of action even though the plaintiff may ultimately not be entitled to any relief" (Resp. Br. pp. 27-28), as long as he "renders a service." (Resp. Br. pp. 30-31) What Helms neglects to point out, however, is

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No matter how far Helms attempts to stretch the private attorney general concept, it cannot be extended beyond the limits of Article III of the Constitution. Respondent repeatedly argues that it is immaterial that he received no personal benefit and suggests that his "victory" will inure to the benefit of unnamed others who someday may be faced with a prison misconduct charge

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(FOOTNOTED CONTINUED)

that the plaintiffs in Mills succeeded in obtaining summary judgment on the issue of defendants' liability which was affirmed by this Court. 396 U.S. at 379. Thus, the plaintiffs in Mills had succeeded in obtaining partial judgment in their favor -- considerably different from stating a claim or rendering a service to the nation's jurisprudence.

supported by confidential informant testimony. In any given case, of course, it is conceivable that a court's decision may affect others collaterally; however, the court's power under Article III "exists only to redress or otherwise to protect against injury to the complaining party." Warth v. Seldin, 422 U.S. 490, 499 (1975)(emphasis supplied). Those who do not possess standing under Article III may not even litigate in the courts of the United States. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 475 (1982). To award attorney's fees where the complaining party possessed no right to request relief from the court, much less reap a reward, cannot be consistent with the limitations of Article III. As the

Court stated in Valley Forge, Article III requirements are "not merely a troublesome hurdle to be overcome if possible" in order to reach the merits of a case; they are an integral part of the constitutional limitations on a federal court's power to hear cases. Ibid.[4]

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[4]Respondent quotes (Resp. Br. p. 19) from a portion of a House report, No. 94-1558, p. 9, which, taken out of its context, appears to support his view of the definition of prevailing party. But the quoted language appears in the report's discussion of the standards for computing a reasonable fee. What constitutes a prevailing party -- the issue here -- is discussed elsewhere. See H. Rep. No. 94-1558, pp. 6-8. Moreover, the quoted language, which mentions the availability of fees even if immunity precludes an award of damages, nowhere supports the view that fees are available if no relief is awarded.

II. THE POLICY OF IMMUNITY

Our argument that awarding fees to respondent would weaken the policy underlying the qualified immunity defense for public officials is met primarily by respondent's citation to the Court's decision in Pulliam v. Allen, 466 U.S. 522 (1984). Helms' reading of Pulliam is a gross over-simplification of the decision.

In Pulliam, the Court held that judicial immunity was not a bar to an award of attorney's fees under §1988 where the plaintiffs obtained an injunction from a federal court against a state magistrate's bail practices. After surveying the common law under-pinnings of the judicial immunity doctrine, the Court concluded that neither the English nor American common

law recognized an absolute judicial immunity from prospective relief and that, in enacting the Civil Rights Act, Congress did not express an intent to abrogate the common law rule. Once the Court determined that the doctrine of judicial immunity did not prevent the entry of an injunction, it concluded that the purpose of awarding attorney's fees under § 1988 would be thwarted if the doctrine prevented the successful plaintiffs from recovering fees for having obtained their injunction. Id., 466 U.S. at 543-44.

Unlike respondent here, the plaintiffs in Pulliam were entitled to and did achieve a personal benefit -- an injunction -- against the defending state official. Thus, if Helms had obtained an

injunction or other relief on his claim, the fact that petitioners are immune from damages would not by itself necessarily preclude an award of fees for Helms' success. But this case is not Pulliam, since respondent achieved none of the relief sought in his action.

This reading of Pulliam is supported by the Court's quotation from Supreme Court of Virginia v. Consumers Union of United States, Inc., 446 U.S. 719, 739-39 (1980):

> The House Committee Report on § 1988 indicates that Congress intended to permit attorney's fees awards in cases in which prospective relief was properly awarded against defendants who would be immune from damages awards.

466 U.S. at 544. The Court in Pulliam therefore was concerned with the issue whether fees should be awarded against a state official against whom an injunction properly had been entered, not with the issue as here whether fees are available from state officials against whom no relief has been, or could have been, awarded.

"[L]iability on the merits and responsibility for fees go hand in hand...;" only the party "legally responsible for relief on the merits" should be responsible for attorney's fees. Kentucky v. Graham, No. 84-849 (June 28, 1985), Slip op. at 5. See also Ruckleshaus v. Sierra Club, 463 U.S. 680, 685 (1983)(a "successful party need not pay its unsuccessful adversary's fees"). Pulliam recognizes that success on the merits supports a fee

award in the absence of a congressional policy statement to the contrary. Congress did not, however, divorce liability on the merits from responsibility for fees. Thus, a plaintiff should not be permitted to dilute an official's immunity by recovering fees when the plaintiff receives no relief from the official. As we demonstrated in our principal brief, the facts of this case would undermine the well-settled immunity for state officials if respondent is entitled to fees despite his failure to obtain relief from the officials.[4]

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[4]Finally, we fail to understand the significance of Helms' argument that Pennsylvania's Office of Attorney General, rather than private counsel, has represented petitioners in this litigation. (Resp. Br. pp. 51-52) The

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(FOOTNOTE CONTINUED)

mere fact that the Commonwealth elects to provide representation to its employees, as a benefit of employment, when they are sued as individuals in federal court does not convert an action against the individual employees into an action against the state itself. And Helms' suggestion that our position on his entitlement to fees somehow is an attempt to transfer responsibility for the payment of fees to the individuals has absolutely no foundation either in or outside the record.

CONCLUSION

For the reasons stated above and in our opening brief, the decision of the Court of Appeals should be reversed with directions to affirm the District Court's denial of respondent's application for attorney's fees.

Respectfully submitted,

LeROY S. ZIMMERMAN
Attorney General

THOMAS G. SAYLOR, JR.
First Deputy Attorney General

ANDREW S. GORDON
Chief Deputy Attorney General
Chief, Litigation Section

GREGORY R. NEUHAUSER
Senior Deputy Attorney
General

Office of Attorney General
15th Fl., Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

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Petitioners,

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

PETER J. KALIS
KIRKPATRICK & LOCKHART
1500 Oliver Building
Pittsburgh, PA 15222
(412) 355-6562
Of Counsel

BENNA RUTH SOLOMON *
Chief Counsel
JOYCE HOLMES BENJAMIN
STATE AND LOCAL LEGAL CENTER
444 North Capitol St., N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445

* *Counsel of Record for* Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether a civil rights plaintiff is entitled to an award of attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976 when the litigation for which he seeks fees has resulted in no relief for him.

2. Whether a civil rights plaintiff may base a claim for attorney's fees, or augment an attorney's fee award, on a "catalyst" theory because of the promulgation, during the pendency of the litigation, of a revision of an administrative directive that was neither sought by nor of benefit to the plaintiff.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1630

LOWELL D. HEWITT, *et al.*,
Petitioners,

v.

AARON HELMS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.

This case requires further definition of the circumstances under which a plaintiff is a "prevailing party" within the meaning of 42 U.S.C. § 1988. *Amici* are concerned that the increasing frequency and amount of attorney's fee awards in civil rights cases threaten the solvency of state and local governments and that the court of appeals' expansive view of the "catalyst" theory as a basis for awarding attorney's fees will inhibit state and local governments in the adoption of needed reforms.

Respondent Helms, a prison inmate, filed suit in 1979 challenging, *inter alia*, his conviction of prison misconduct on the unsupported testimony of an unidentified informant. In the course of several judicial decisions recounted below, the court of appeals ultimately determined that Helms had prevailed in his litigation and thus deserved an award of attorney's fees. The court of appeals held that a mere declaration of Helms' rights, even where no damages were available and no injunctive relief could be awarded, along with the possibility that he served as the catalyst for certain administrative reform, made him a prevailing party.

Under the circumstances of this case, which are elaborated below, an award of attorney's fees to Helms is not justified by Section 1988 and is inimical to the continuing vitality of state and local governments. *Amici* suggest that a plaintiff who has not recovered any substantive relief cannot be said to be a prevailing party in any meaningful sense of the word. *Amici* also suggest that any attorney's fees awarded on a catalyst theory must be justified by a rigorous standard of proof of causation. If an award of attorney's fees is appropriate at all, it must be limited to only that amount fairly allocable to the exceedingly minimal success achieved in the declaration of Helms' rights. Accordingly, *amici* submit this brief to assist the Court in its resolution of this case.*

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* Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

STATEMENT OF THE CASE

On December 3, 1978, Aaron Helms ("Helms") was a prison inmate at the State Correctional Institution at Huntingdon, Pennsylvania, when several guards were injured during a general disturbance. Following the incident, Helms was taken from his cell, escorted to an interview with Pennsylvania State Police, and then placed in restrictive custody. Subsequently, Helms—charged with the assault of corrections officers and the disruption of institutional routine—appeared before a Hearing Committee, an institutional adjudicatory body authorized to resolve misconduct charges. At that time, the Committee did not specifically address the issue of Helms' guilt, but did order that he remain in a restrictive housing unit, in "administrative custody." [1] On January 22, 1979, a second Committee, finding that Helms had assaulted a prison official and had participated in a prison riot, sentenced Helms to six months in "Disciplinary Close Custody." The finding of guilt apparently rested on an uncorroborated report of an unidentified informant.[2]

From this modest beginning has sprung seemingly endless litigation between Helms and officials of the Commonwealth of Pennsylvania. On July 26, 1979, Helms filed a suit pursuant to 42 U.S.C. § 1983 against certain prison officials in which he challenged (1) his detention in administrative custody and (2) his conviction of prison misconduct. In support of his first challenge, Helms claimed that his Fourteenth Amendment due process rights had been infringed by a violation of Pennsylvania's Bureau of Corrections regulations governing administrative segregation because the regulations created a liberty

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[1] The Commonwealth subsequently filed criminal charges against Helms which were dropped on February 6, 1979.

[2] This truncated version of the factual predicate to this litigation may be supplemented by a reading of *Helms v. Hewitt*, 655 F.2d 487, 489-92 (3d Cir. 1981).

interest of which he could be deprived only if he were afforded due process. In support of his second challenge, Helms alleged that his conviction was based on an uncorroborated hearsay account which was constitutionally insufficient. The complaint sought the customary array of remedial options with respect to Helms' restrictive confinement, *i.e.*, declaratory and injunctive relief, damages, costs and attorney's fees, and added the usual prayer for other "necessary and proper" relief.

While the case was pending before the United States District Court for the Middle District of Pennsylvania, and before any decision, Helms was released from prison on parole. His litigation juggernaut, however, which was just gathering steam, rolled on unchecked. When the district court granted summary judgment to the defendants, Helms appealed. The United States Court of Appeals for the Third Circuit ruled that Helms indeed had a liberty interest against his transfer to administrative custody, and that Helms' due process rights had been violated by his conviction of prison misconduct on the uncorroborated hearsay evidence of an unidentified informant. 655 F.2d 487 (1981). The Commonwealth's officials then petitioned this Court for a writ of certiorari. The Court granted the petition, agreed with the court of appeals that Helms had a liberty interest against his transfer to administrative custody, but concluded that Helms had been afforded due process with respect to that liberty interest. The defendants did not seek review in this Court of the court of appeals' holding with respect to the hearsay issue. 459 U.S. 460 (1983).

On remand, the Third Circuit in turn remanded to the district court for further proceedings on the hearsay issue. 712 F.2d 48 (1983). The district court found that the prison officials were entitled to qualified immunity and thus refused any award of damages on this claim. Joint Appendix ("J.A.") 22a-47a (unpublished). While an appeal to the Third Circuit was pending, the Pennsylvania

Department of Corrections issued a comprehensive revision of Administrative Directive 801, which governs prison disciplinary proceedings. The revised Directive included a new section on the use of confidential source materials in hearings on charges of prison misconduct. The Third Circuit later affirmed, without opinion, the district court's judgment against Helms based on defendants' immunity from damages. 745 F.2d 46 (1984).

Thereafter, Helms filed an application for attorney's fees pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 ("the Fees Act" or "the Act"). The district court denied the application, finding that Helms was not a "prevailing party" within the meaning of the Act because he had lost his claim for damages; his claim for injunctive relief had been mooted by his release from prison; and he had neither sought nor benefitted from the change in administrative procedure. Appendix to the Petition for Certiorari ("Pet. App.") 27a-39a.

The litigation once again proceeded to the Third Circuit, which reversed the district court. Pet. App. 3a-26a, 780 F.2d 367 (1986). According to the court of appeals, Helms was a prevailing party because of its ruling on Helms' first appeal (at which time Helms had already been released from prison on parole) that his due process rights had been violated by the prison officials' unconstitutional reliance on the testimony of an unidentified informant. The court of appeals directed the district court to award attorney's fees "for professional services relating to this issue." Pet. App. 20a, 780 F.2d at 371.

The court of appeals also considered Helms' claim that he was a prevailing party because his suit acted as a catalyst for the promulgation of the revision of Administrative Directive 801.[3] The court stated that it reached

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[3] The court of appeals first referred to the relief allegedly obtained by Helms as the *promulgation* of Administrative Directive 801 (Pet. App. 13a-14a, 780 F.2d at 369), but subsequently cor-

this issue, notwithstanding that it had already found Helms to be a prevailing party, because "one factor in the computation of the amount of the fee award is the extent of relief actually obtained by the prevailing party," *citing Hensley v. Eckerhart*, 461 U.S. 424 (1983). Pet. App. 21a, 780 F.2d at 371. The court of appeals held that if Helms "can establish causation between his suit and 'some of the benefit sought,' he [would be] a prevailing party on this issue." Pet. App. 24a, 780 F.2d at 371. Accordingly, the court of appeals directed the district court to award Helms attorney's fees on the first ground and to hold a hearing on the second ground.

SUMMARY OF ARGUMENT

I. The Civil Rights Attorney's Fees Awards Act of 1976 provides for the award of a reasonable attorney's fee only to a prevailing party. While Congress intended to reward successful litigants who serve as private attorneys general in the civil rights area, it did so within the framework of our adversary system of justice, and legislated that only winners may recover attorney's fees. As the Court has observed, "the most critical factor" in ruling on a fee application "is the degree of success obtained" (*Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983)).

Helms did not prevail in his litigation in any meaningful sense. In several years of litigation, at all three levels of our federal courts, he succeeded only in obtaining a ruling that he should not have been convicted of prison misconduct solely on the uncorroborated hearsay

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rectly noted that what had been issued was a *revision* of the Directive. Pet. App. 21a-25a, 780 F.2d at 371, 372. What the court of appeals did not explain was that Administrative Directive 801 is a comprehensive regulatory statement of prisoners' rights and responsibilities; that it was completely reorganized and revised in 1984 (*compare* J.A. 58a-84a *with* J.A. 85a-116a); and that only one section of the revision (1½ of 31 record pages) pertains to the use of confidential source information (J.A. 101a-102a).

evidence of an unidentified informant. At the time that he obtained this ruling, his earlier request for injunctive relief had been mooted by his release from prison on parole; and, on remand, his claim for damages was defeated by defendants' good faith immunity. The resulting judgment in favor of defendants was affirmed. Thus, Helms achieved no tangible success. Defendants, having achieved a complete victory in terms of the outcome of the lawsuit, should not now be saddled with Helms' attorney's fees.

Even if Helms' litigation was a catalyst for the revision of Administrative Directive 801, that would not make him a prevailing party in his lawsuit, for he obtained none of the individual relief he sought. Helms did not seek any relief for persons other than himself, and received no personal benefit from the revision.

II. A civil rights plaintiff may be a prevailing party eligible for an award of fees even in the absence of a formal judgment in his favor. For example, a fee award may be justified if the litigation serves as a catalyst causing defendants to alter unlawful behavior. However, an award of fees on a catalyst theory requires a showing of causation which is entirely absent from this record.

The bases for the court of appeals' direction to the district court to hold a hearing to determine whether Helms' lawsuit served as a catalyst for the revision of Administrative Directive 801 were (1) an expansive reading of Helms' complaint; and (2) the timing of the the revision. The first ground was contrary to the district court's specific finding that Helms did not "seek relief in the form of corrective procedures." The second ground reflected only the coincidence that Helms' appeal from the final judgment against him was still pending when the revision was issued; the court apparently discounted the fact that the revision was not promulgated until nearly three years after its ruling that Helms' rights had been violated.

These factors, even buttressed by the fact that a part of the revision related to the subject matter of Helms' suit, are insufficient, as a matter of law, to warrant a formal hearing on Helms' claim that his lawsuit served as a catalyst for the revision.

Public policy concerns militate against the facile conclusion that individual litigation—particularly unsuccessful litigation—serves as a catalyst for far-ranging legislative or administrative reforms. The effect of crediting Helms' catalyst theory under the circumstances of this case would be to penalize defendants for action voluntarily taken after they had successfully defended the lawsuit. Moreover, if litigants are not held to a rigid standard of proof in claiming fees on such a theory, the result could be to paralyze reforms that are in any way related to pending or even completed litigation.

Should this Court agree with the court of appeals that there is sufficient basis in this record to require a hearing to determine whether Helms' litigation materially contributed to the revision of Administrative Directive 801, it should make clear that recovery of attorney's fees on a catalyst theory requires proof by clear and convincing evidence (1) that "but for" the litigation, the revision would not have occurred; and (2) that the litigation was the proximate cause of the revision.

III. If the Court concludes that Helms may properly be considered a "prevailing party" within the meaning of the Fees Act, any award of attorney's fees should be restricted to those services that led to the court of appeals' ruling that his conviction of prison misconduct was improperly grounded on the uncorroborated hearsay testimony of an unidentified informant. This declaration was the only "success" that Helms obtained in the lawsuit; and that ruling provides the only foundation for his claim that he caused a revision of Administrative Directive 801.

ARGUMENT

I. HELMS IS NOT A PREVAILING PARTY ENTITLED TO AN AWARD OF FEES

Few statutory provisions have generated as many judicial opinions in the first decade of their existence as has the Civil Rights Attorney's Fees Awards Act of 1976. In the swirling proliferation of litigation, judicial prose, as a basis for interpreting the Act, is seductive; but reliance on it, at least in the first instance, is misplaced. As this Court has consistently observed, " '[t]he starting point in every case involving construction of a statute is the language itself.' " *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976), *quoting Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring).

The language at issue is deceptively simple. The Act provides, in relevant part, that a district court has discretion, in certain specified federal civil rights actions, to allow the "prevailing party . . . a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988, set forth in Appendix A-1. The Act's legislative history makes clear that Congress sought to alter the law as announced in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), which had repudiated the judicially created "private attorney general" exception to the American Rule that prevailing parties cannot recover their attorney's fees from the losing party absent a statutory authorization or a case falling into preexisting exceptions.[4] As stated in the Senate Report,

> [t]he purpose of this amendment is to remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in *Alyeska Pipeline Service Co. v. Wilderness Society*,

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[4] *See* Note, *Surveying the Law of Fee Awards under the Attorney's Fees Awards Act of 1976*, 59 Notre Dame L. Rev. 1293, 1293 n.1 (1984) (describing preexisting exceptions).

> 421 U.S. 240 (1975), and to achieve consistency in our civil rights laws.

S. Rep. No. 1011, 94th Cong., 2d Sess. 1 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908, 5909.

Although Congress clearly sought to respond to the holding in *Alyeska*, it is crucial to bear in mind the language that it chose to accomplish the task. Thus, a fee applicant must be a "party" who "prevail[s]," and his fee award must be "reasonable." This language reflects at once an intention to reward private attorneys general in the civil rights area and to observe a measure of fidelity to our adversary system of justice while doing so. By linking the terms "party" and "prevail," Congress acknowledged and acquiesced in an adversary system of justice that declares winners and losers, and legislated that only winners are to be awarded attorney's fees.[5] And, as any novice litigator understands, since wins (and losses) can at times result from fortuity as much as finesse, from apathy as much as advocacy, the award of fees must be "reasonable." Congress sought to reward successful private attorneys general within the context of an adversary system of justice, not to compel state and local governments to subsidize quixotic journeys across the legal landscape.

A. Helms Won Nothing By His Litigation

In light of this understanding of the Act, it is clear that in no meaningful sense did Helms prevail in this litigation. Notwithstanding Helms' continuing legal asasault on the Commonwealth's officials named as defendants in this suit, the court of appeals could point only to its earlier ruling that Helms had been denied due process by the prison officials' unconstitutional reliance on the

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[5] To be sure, the win would not have to be registered in a final judgment, but it nonetheless would have to exist. S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 5912.

informant's testimony and to the possibility that Helms' litigation may have been the catalyst behind the revision of Administrative Directive 801.

The Third Circuit's narrow focus ignores the fact that this case actually involves several years of litigation and eight decisions at three levels of our federal courts. Helms' entire achievement was a ruling that he had a due process right not to have a finding of guilt grounded exclusively on the testimony of an unidentified informant.[6] And, on the basis of that ruling, the court of appeals directed the district court to enter summary judgment for Helms on that issue *unless* the defendants established their official immunity. 655 F.2d at 502-03. The district court, however, held that the defendants were entitled to qualified immunity and accordingly entered summary judgment for *defendants*. J.A. 48a. Moreover, Helms' resounding "victory"—the ruling that he had been improperly placed in disciplinary custody—was achieved after he had been released from prison on parole.[7] At the risk of oversimplication, and with great respect, *amici* submit that common sense would seem to present a formidable obstacle to the conclusion that Helms "prevailed."[8] Put

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[6] The court of appeals' holding, on Helms' first appeal—"that he had a liberty interest in certain prison regulations"—did not make him a "prevailing party" because this Court held that the requirements of due process had been properly observed with respect to that interest.

[7] In fact, Helms was released on parole before the district court's first decision in favor of the defendants. The complaint had not even been filed until after Helms' release from disciplinary custody. His six-month sentence to disciplinary custody began on December 3, 1978, and thus ended on June 3, 1979. J.A. 16a. The amended complaint in this action was not filed until July 26, 1979. J.A. 1a.

[8] Helms notes that he is once again incarcerated, presumably to show that he may benefit from his litigation. Memorandum in Opposition n.1. It is respectfully submitted that courts must look to adjudicative, *i.e.*, historical, facts in determining the success of civil rights litigation. Congress could not have intended to justify past fees on the basis of future legal infractions by the plaintiff.

another way, "[t]o prevail [under the Act], a plaintiff must obtain 'the primary relief sought.'" *Carbalan v. Vaughn*, 760 F.2d 662, 666 (5th Cir.), *cert. denied*, 106 S.Ct. 529 (1985), *quoting Taylor v. Sterrett*, 640 F.2d 663, 669 (5th Cir. 1981). Helms obtained no such relief.[9]

Congress did not enact the Fees Act to launch academic careers or to reward moral victories. *See, e.g., Dover v. Rose*, 709 F.2d 436, 439 (6th Cir. 1983) ("Thus, while the plaintiff may claim a 'moral victory' in this lawsuit, he has failed to prove that he is entitled to any relief whatsoever" and thus is not a prevailing party under the Act). The legislative history of the Act contains no shred of evidence that Congress intended to divorce the process of vindication of civil rights, insofar as that process leads to awards of fees under the Act, from the adversary system of justice. That system entails winners and losers, and sometimes yields inconclusive results when there are neither winners nor losers. To secure a fee award under the Act, however, one must in some real sense be a winner. As this Court has observed, "Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, *the most critical factor is the degree of success obtained.*" *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) (emphasis added). *Cf. Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983) (to ground a fee award under § 307 of the Clean Air Act,

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[9] Helms puts much store in his achievement of declaratory relief. *See* Memorandum in Opposition ¶ 4. No declaratory judgment was entered for Helms; he relies on the court of appeals' declaration of his due process rights. Moreover, a claim for declaratory relief is routinely included in many civil complaints; yet, as any litigator understands, such relief is typically meaningless absent a corresponding award of damages or injunctive relief. Thus, the absence of a request for declaratory relief in *Carbalan* in no way distinguishes that case from the present one.

some success on the merits is required; merely contributing to the goals of the Act is insufficient).

In contrast to Congress's focus on successful plaintiffs, Helms achieved no tangible success. Indeed, it is clear upon even the most charitable view that Helms' "success" amounts at best to a moral victory. First, Helms' release from prison mooted his claim to injunctive relief concerning his confinement.[10] Second, Helms lost his claim for damages when the court of appeals affirmed the district court's decision that the prison officials whom he sued were shielded by qualified immunity. Third, Helms never sought and could not benefit from the reform provided by the revision of Administrative Directive 801. Under these circumstances, Helms simply did not prevail in fact.

In a related context, this Court recently reiterated that damages awarded pursuant to 42 U.S.C. § 1983 are not to be based on the abstract value or importance of constitutional rights but rather must be confined to the basic purpose of Section 1983 damages, *i.e.*, to compensate persons for injuries caused by the deprivation of constitutional rights. *Memphis Community School District v. Stachura*, 106 S.Ct. 2537, 2543-45 (1986); *see Carey v. Piphus*, 435 U.S. 247, 254 (1978). It would be strikingly anomalous, at the very least, to permit a plaintiff to recover fees for his attorney for abstract "victories" when that plaintiff may recover nothing for himself. Such an extension of the Act is simply not warranted. *Cf. Pulliam v. Allen*, 466 U.S. 522 (1984) (where damages are precluded by official immunity, a fee award was nonetheless possibly appropriate but only because injunctive relief was in fact granted).

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[10] Although Helms also sought injunctive relief requiring that his conviction be expunged from his prison records (J.A. 20a), the district court noted that Helms did not receive any injunctive relief. Pet. App. 30a. Apparently, this claim was abandoned in the district court on the remand for trial on the immunity issue.

The arguments relied on by Helms and accepted by the Third Circuit suffer from a basic confusion concerning the Act and this Court's decisions under the Act. Helms seems to contend (without opposition) that one need not return from court with a judgment in hand in order to be a successful civil rights litigant; other forms of success are also cognizable under the Act. *See* S. Rep. No. 1011, *supra*, at 5, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5912. *Amici* do not dispute this proposition. However, this is not a case in which the plaintiff achieved tangible benefit for himself short of judicial decision. *See, e.g., Maher v. Gagne*, 448 U.S. 122 (1980) (consent decree).[11] This litigation is replete with judicial decisions at all three levels of our federal court system. What this litigation lacks is not decisions but any tangible benefit in those decisions for the plaintiff.

Raising a myriad of claims and arguments, Helms achieved from the Third Circuit an abstract declaration of a substantive right that possibly could have grounded a claim for damages if the defendants were legally susceptible to such a claim, which they were not. This is not the stuff of "success." Such a declaration is little more than interlocutory success that may ultimately, and in this case did, evaporate for all practical purposes. *See Hanrahan v. Hampton*, 446 U.S. 754, 757 (1980) (finding that "it seems clearly to have been the intent of Congress to permit such an interlocutory award only to a party who has established his entitlement to some relief on the merits of his claims"). When evaluating an application for fees in the absence of a formal judicial decision granting tangible relief, courts must focus unwaveringly on the substance and cause of the outcome upon which the litigant rests his claim to have prevailed. *See American Constitutional Party v. Munro*, 650 F.2d 184

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[11] Nor is this a case where plaintiff's counsel sought remedial relief in an administrative forum to vindicate rights gained earlier in a consent decree. *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 106 S.Ct. 3088, 3094-96 (1986).

(9th Cir. 1981); *cf. Hensley v. Eckerhart*, 461 U.S. 424 (1983). The outcome of Helms' litigation simply does not withstand this scrutiny.

The Fees Act should not be interpreted in such a way as to discourage governmental defendants from interposing meritorious defenses in civil rights suits, even though a defense effort might generate significant legal expenses. Governmental defendants have an obligation to resist litigation claims that would result in inappropriate payments from the public treasury. In this case, the defendants' successful efforts resulted in rejection of all of Helms' monetary claims; his remaining claims were either moot or abandoned. Having achieved a complete victory, in terms of the outcome of the lawsuit, defendants are now faced with an attorney's fee claim in an amount which might exceed any damages that Helms would have recovered had the judgment on the issue of defendants' official immunity been in his favor. *Cf. City of Riverside v. Rivera*, 106 S.Ct. 2686 (1986) ($33,350 damages and more than $245,000 attorney's fees).

If this Court affirms the court of appeals' judgment, governmental defendants will not be able to afford to defend a civil rights suit that presents even a single meritorious abstract legal principle. This result would reverse the usual burden of proof in civil litigation by requiring defendants not only to resist successfully the plaintiff's claims to affirmative relief, but also to demonstrate that none of his arguments has theoretical validity. Defendants would be placed in an impossible position by an interpretation of Section 1988 that would expose them to liability for attorney's fees even if they successfully defend a lawsuit.

B. The Revision of Administrative Directive 801 Did Not Benefit Helms So As to Make Him a Prevailing Party

Helms attempts to claim "success" by relying on a "catalyst" theory and citing the revision of Administra-

tive Directive 801. Even if Helms could establish that he was the catalyst for the revision (which he cannot, as we show in Part II, *infra*), it would not make him a prevailing party because he received no personal benefit from the Directive, and he sought no relief for anyone other than himself.[12] Helms had been released from disciplinary custody even before his complaint was filed, and he was released from prison long before the court of appeals' determination that his rights had been violated through use of the informant's hearsay testimony. Thus, the revision of Administrative Directive 801 could not benefit Helms and could not make him a prevailing party on his claim for individual relief.[13]

The legislative history of the Fees Act and the caselaw make clear that, although Congress intended that the availability of attorney's fees in civil rights cases would enable individual plaintiffs to act as "private attorneys general," it nevertheless imposed the requirement that the plaintiff must be a prevailing party. The only reasonable conclusion is that Congress must have thought the requirement not inconsistent with the goal. Thus, in the absence of success on the plaintiff's individual claim, vindicating the rights of others will make a plaintiff a prevailing party only if he specifically pursues and succeeds in satisfying the claims of others. If the plaintiff does not advance claims on behalf of others, whatever benefit may redound to them is not credited to him and cannot make him a prevailing party.

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[12] The complaint's added prayer for "necessary and proper" further relief cannot reasonably be stretched so far as to encompass claims on behalf of other persons because the facts and allegations of the complaint and the more specific requests for relief relate exclusively to Helms' own situation. *See* J.A. 20a-21a.

[13] Helms did not bring a class action, in which a plaintiff seeking relief for others might claim to be a prevailing party because he had vindicated the rights of others in the class. *See, e.g., Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421 (8th Cir. 1970).

In legislating the Fees Act, Congress took cognizance of the existing caselaw. In particular, the legislative history cites with approval this Court's interpretation in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), of the term "prevailing" as used in the Civil Rights Act of 1964. *See* S. Rep. No. 1011, *supra*, at 3, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5910. In *Newman*, this Court concluded that fees were appropriate where the party had succeeded "not for himself alone but *also* as a 'private attorney general.'" 390 U.S. at 402 (emphasis added). *See also Zarcone v. Perry*, 581 F.2d 1039, 1042 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979) ("Congress was concerned with enforcement not only of the civil rights of the public at large and of identifiable groups but also with the rights of individual plaintiffs"). Other courts have accordingly held that, in order to support an attorney's fee award, relief obtained for others must be in addition to the plaintiff's personal success or must have been sought by, and therefore creditable to, the plaintiff. *Compare Institutionalized Juveniles v. Secretary of Public Welfare*, 758 F.2d 897, 910-12 (3d Cir. 1985) (class action), *with Othen v. Ann Arbor School Board*, 699 F.2d 309, 313-14 (6th Cir. 1983) (claim for individual relief); *see also N.A.A.C.P. v. Wilmington Medical Center, Inc.*, 689 F.2d 1161, 1167 (3d Cir. 1982), *cert. denied*, 460 U.S. 1052 (1983) (plaintiffs "have prevailed for purposes of Section 1988" if "they can establish causation between their litigation and 'some of the benefits' *they sought*") (emphasis added; citation omitted).

Thus, even if Helms' litigation were the catalyst for the revision of Administrative Directive 801, this would not make him a prevailing party. As we show below, however, Helms cannot successfully claim to be the catalyst.

II. THE *HELMS* LITIGATION WAS NOT THE CATALYST BEHIND THE REVISION OF ADMINISTRATIVE DIRECTIVE 801

As noted earlier, a plaintiff need not obtain formal relief in order to recover fees under the Act. *See, e.g., Maher v. Gagne*, 448 U.S. 122 (1980); S. Rep. No. 1011, *supra*, at 5, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5912. Thus, a party who vindicates his rights through a consent judgment or prevails on an important matter in the course of litigation, even though he does not ultimately prevail on all the issues, may yet remain eligible to be awarded fees. One type of success, short of a formal judicial judgment, for which the plaintiff may be entitled to a fee award, is achieved when litigation acts as a "catalyst" for defendants to alter unlawful conduct.[14] In this case, however, Helms is not entitled to an award of fees because he has not shown, and cannot show, that he was the catalyst behind the revision of Administrative Directive 801.

In determining whether a plaintiff can receive an award of attorney's fees on such a "catalyst" theory, the courts examine the factual and legal environment of the case presented. As the court explained in *Bonnes v. Long*, 599 F.2d 1316, 1319 (4th Cir. 1979), in reviewing such a fee application the district court must evaluate

> whether as a quite practical matter the outcome, in whatever form it is realized, is one to which the plaintiff['s] . . . efforts contributed in a significant way, and which does involve an actual conferral of benefit or relief from burden when measured against the benchmark condition.

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[14] *See, e.g., Robinson v. Kimbrough*, 652 F.2d 458, 465 (5th Cir. 1981); *see also Othen v. Ann Arbor School Bd.*, 699 F.2d 309, 313 (6th Cir. 1983) (dictum); *American Constitutional Party v. Munro*, 650 F.2d 184, 187 (9th Cir. 1981) (dictum); *cf. Hensley v. Eckerhart*, 461 U.S. 424, 439 n.15 (1983).

In this case, as we discuss in Part I, it is clear from the record that the litigation's outcome conferred no benefit on Helms, who had long since been released on parole, and who had sought relief for no one other than himself. Moreover, even if revised Administrative Directive 801 is deemed to "involve an actual conferral of benefit or relief from burden" (*Bonnes, supra*), Helms has fallen woefully short of establishing on the record that his efforts contributed to the revision "in a significant way" (*ibid.*). *See American Constitutional Party v. Munro*, 650 F.2d 184, 188 (9th Cir. 1981) (plaintiff must show "some sort of clear, *causal relationship* between the litigation brought and the practical outcome realized") (emphasis in original).

In *Ross v. Horn*, 598 F.2d 1312 (3d Cir. 1979), *cert. denied*, 448 U.S. 906 (1980), the plaintiffs filed a class action for injunctive relief in district court, challenging New Jersey's procedure for handling suspected fraud in unemployment benefits. After the suit was filed, New Jersey made changes that cured the alleged faults in its benefit processing system. This administrative action then led to the entry of judgment against the plaintiff. Nevertheless, the court ruled that the plaintiffs might still be entitled to attorney's fees. It added that, in assessing whether the plaintiff is "a prevailing party," a court must look to the substance of the litigation's outcome. If the new procedures, which provided much of the relief that the plaintiffs had initially sought, were implemented *as a result of the lawsuit*, then they were prevailing parties with respect to a portion of their claims (which were thereby effectively mooted) irrespective of the judgment entered against them on the balance of their claims. *Id.* at 1322.

Cases such as *Ross* underscore the importance of the causal relationship between the lawsuit and the relief claimed as the basis for the fee award. Although the catalyst theory may have a place in the determination

whether a plaintiff is a prevailing party, that plaintiff must do more than identify administrative reform that took place, fortuitously, after his complaint was filed and before the decision on his appeal from an adverse final judgment.[15] The coincidence in time is particularly suspect as evidence of causation in a case like this one that has now been in the courts for more than seven years. Helms would depict a scenario in which he withstood great efforts at dissuasion and finally prevailed in a battle waged over prisoners' civil rights. However, his mere assertion of causation should be insufficient as a matter of law to require a formal hearing of his claim that his lawsuit was the catalyst for revision of the Administrative Directive.

The two factors relied upon by the court of appeals in this case—an imaginative rendering of the complaint, and a telescopic view of the timing of the administrative reform in relation to the litigation—must also be insufficient, as a matter of law, to create an issue regarding causation. First, the court noted (Pet. App. 22a, 780 F.2d at 371) "that the plaintiff specifically requested a change in the defendants' practice so far as it was applied to him." The complaint, however, was not couched in terms of "defendants' practice." Helms did not challenge any existing procedural rules, or even the absence of such rules. He simply sought relief from his own conviction of misconduct and confinement in restricted custody. Not content with the expansion of the plain terms of the complaint, the court then inferred that it "contemplated a modification in the treatment of all prisoners subject to disciplinary actions based on information obtained from confidential informants." Pet. App. 22a-23a, 780 F.2d at 371. The court of appeals plainly erred in its speculation concerning the relief "contemplated" by

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[15] Helms' petition for attorney's fees contains three paragraphs that simply announce that he is a prevailing party without even alluding to the catalyst theory or the administrative reform that Helms claims to have caused. J.A. 49a-50a.

Helms.[16] His complaint was clearly, specifically, and exclusively concerned with his own situation; and the record of the case does not contain a single factual allegation tending to demonstrate a nexus between this lawsuit and the revision of Administrative Directive 801.

The touchstone in determining whether a fee award is appropriate, as this Court has made clear, is the relationship between the relief that the plaintiff has sought and the relief obtained. *See Hensley v. Eckerhart*, 461 U.S. at 434, 440. This Court has never suggested an inquiry into what relief the plaintiff may have "contemplated."

Second, the court of appeals found that the "timing of the promulgation of the revised regulations in relation to the course of this suit is sufficient to suggest that the district court should review carefully the causation issue." Pet. App. 24a-25a, 780 F.2d at 371. The suit, however, remained pending only in a technical sense at the time of the administrative revision. Helms had lost his case. The only remaining trace of his litigation was the pendency of his appeal on the issue of defendants' immunity from damages—an appeal that resulted in affirmance of the summary judgment that had been entered against him. The timing of the revision in relation to the single favorable ruling that Helms received undercuts any reliance on a catalyst theory. The court of appeals had ruled on June 30, 1981, that Helms' rights had been violated. Revised Administrative Directive 801 was not promulgated until May 1, 1984. The wheels of government may turn slowly, but the delay of nearly three years appears conclusive that Helms' lawsuit was not the motivating factor of the revision.

Under these circumstances, *amici* submit that the court of appeals erred when it directed a hearing on Helms'

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[16] Indeed, the court's speculation is directly contrary to the specific finding of the district court, that Helms did not "seek relief in the form of corrective procedures . . . in the use of undisclosed informants." Pet. App. 38a.

contention that he served as a catalyst for the revision of Administrative Directive 801.[17]

Compelling public policy reasons also militate against permitting Helms to seek attorney's fees on a catalyst theory on this record. State and local governments are often the targets of suits like Helms'. Such entities constantly have procedures and substantive rules under review, and frequently make changes in the rules to benefit their citizens. Such changes typically occur as one might expect in a democracy: as a result of the interplay of such numerous and complex variables that one cannot, except at the most superficial level, attribute the result to any single event. This truism is common knowledge to public policy analysts. Yet the court of appeals, on a record devoid of any evidence of a connection, would require a hearing to determine whether Helms' lawsuit was a material cause of the revision of Administrative Directive 801. Among other vices, it defies common sense to posit a catalyst theory on no more than general similarity of subject matter and a coincidence of timing.[18]

The Administrative Directive in effect at the time of Helms' confinement in disciplinary custody was completely revised. The revisions, extending throughout the comprehensive regulation, included three new paragraphs relating to the use of confidential source information (J.A. 101a-102a).[19] Simple logic compels the conclusion

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[17] This Court has cautioned that "[a] request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

[18] Compare the finding of the district court in this case, that Helms did not "seek relief in the form of corrective procedures" with the recognition by the district court in *Ross v. Horn*, "that this litigation was 'at least . . . a contributing factor' in the bringing about of these procedural changes" (quoted in 598 F.2d at 1322).

[19] Helms' current assertion of his catalyst theory is stated so broadly that he appears to claim credit for the entire revision; obviously, his lawsuit, which led to the court of appeals' ruling that Helms' due process rights had been violated by his conviction on

that these paragraphs were added as a part of the comprehensive revision process, for reasons having little or nothing to do with Helms.

Crediting Helms' "catalyst" theory would penalize defendants for an action that was taken after they had successfully defended his lawsuit. This fact plainly serves to distinguish those cases which allowed an attorney's fee on the basis of governmental action for the benefit of a plaintiff (or a plaintiff class) that was undertaken before judgment, or after a preliminary decision favorable to the plaintiff. The revision of the Administrative Directive, even as it related to confidential sources, was not required by any court order, nor taken in order to forestall a court order.[20]

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uncorroborated hearsay evidence, could not possibly have precipitated revision of the entire Directive, of which only three paragraphs were remotely relevant to that ruling.

[20] In *Nadeau v. Helgemoe*, 581 F.2d 275, 281 (1st Cir. 1978), the court held that if the "defendants' conduct . . . is not required by law, then [they] must be held to have acted gratuitously and plaintiffs have not prevailed in a legal sense." *Nadeau* involved administrative reform agreed to in a consent decree without any adjudication that the prior practice was unconstitutional. The case aptly discloses the difficulty in identifying a catalyst of actions which, as in this case, are not taken in response to and are not compelled by any pending litigation. Although the Third Circuit ruled that Helms' due process rights had been violated, the section in the revised Directive relating to confidential sources not only went beyond any relief requested by Helms (who was concerned exclusively with his own conviction), but also beyond anything required by the Third Circuit's decision. That decision did not prescribe conditions for the admissibility of confidential hearsay testimony, as the revised Directive does, but ruled only that prison officials could not base a conviction on such testimony in the absence of corroboration or some evidence permitting an evaluation of the informant's credibility. Because the revision of Administrative Directive 801 was neither responsive to nor compelled by the court of appeals' opinion, this Court could hold, as a matter of law, that Helms' litigation was not the cause of the revision. *Cf. Institutionalized Juveniles v. Secretary of Public Welfare*, 758 F.2d 897, 915, 920 (3d Cir. 1985) ("gratuitous judicial endorsement" does not make plaintiff a prevailing party).

Moreover, if Helms is permitted to seek an attorney's fee merely by claiming credit for the revision, the result could be to paralyze legislative or administrative reforms that are in any way related to pending or completed litigation. The revision of Administrative Directive 801 can undoubtedly be manipulated in such a fashion as to give rise to attorney's fee claims by other prison inmates who have obtained a judicial declaration of their rights concerning the conditions of their confinement.[21] Plainly, legislators and administrators cannot be presumed, by their good faith attempts to institute reforms, to be responding to every minimally meritorious prison complaint litigated within their State; a reform measure should not be regarded as such a response in the absence of specific evidence identified by the plaintiff seeking an attorney's fee, linking the reform, in a clear and significant way, to a particular lawsuit.

At most, the section on "Confidential Source of Information" may have been suggested by the court of appeals ruling on Helms' first appeal. Correction officials, as a part of the process of revising the Administrative Directive, would undoubtedly have sought to achieve the greatest currency and constitutional consistency possible. Therefore, the identification by the Third Circuit in Helms' suit of a constitutional flaw in the disciplinary hearing process may have led them to seek to correct that flaw.[22] But Helms' litigation was, in this respect, no more

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[21] The affidavit submitted in support of Helms' fee application advises that, as of September 1980, the legal services organization that represented him had three attorneys working full time on prison matters. J.A. 57a.

[22] We note that in suits based on actions taken after the Third Circuit's opinion, prison officials might have been unable to sustain a good faith immunity defense to a damages action. That kind of a "catalyst" derives from compulsion of a different sort, and serves far different interests. For one thing, such actions are taken to protect defendants and not plaintiffs. There is no reason to credit a plaintiff with causing reforms which benefit defendants.

a catalyst than a lawsuit brought in another jurisdiction would have been.

Should this Court nevertheless conclude that the tenuous connection between this lawsuit and the revision of Administrative Directive 801 suffices to warrant a hearing on Helms' contention that he played a causative role justifying an award of attorney's fees, we urge the Court to set specific guidelines for resolving such claims. Those guidelines, we submit, should acknowledge the weighty public policy reasons for the close scrutiny of any catalyst claim. The burden should be placed on Helms to show by clear and convincing evidence, that *but for his litigation* the Directive would not have been adopted and that his litigation was the proximate cause of the Directive.

The use of "but for" or *sine qua non* analysis is appropriate where, as here, the delineation of causal relationships is difficult, the interest against compelled subsidization of unproductive litigation is substantial, and the lower courts and litigants need to be guided by a legal standard that benefits from the evolutionary influences of the common law. State and local governments must feel free to adopt beneficial changes to their substantive and procedural rules as a matter of sound governmental policy and without concern that, by so doing, they will be required to pay large legal fees generated in litigation that, although contemporaneous with a policy change, bears little or no relationship to its causal origins.[23] "It is probably safe to say that whenever this ['but for'] test is met, the cause in fact relation does

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[23] It is instructive to note, by way of analogy to the law of torts, that the common law has long tended to exclude from evidence the adoption of post-accident precautions because "to admit the evidence would be a great deterrent against taking the precaution, and the law chooses to encourage the precaution." F. Harper, F. James & O. Gray, 3 *The Law of Torts*, § 17.3, at 589 (2d ed. 1986). Similarly, sound public policy reasons suggest that adoption of legislative and regulatory reforms not be discouraged by any concomitant obligation to pay legal fees unless the litigation for which fees are sought actually *caused* the reform.

exist." F. Harper, F. James & O. Gray, 4 *The Law of Torts*, § 20.2, at 91 (2d ed. 1986).

In addition, the Court should require that the cause-in-fact be the proximate (or legal) cause, so that there will be no question that the factual event is "causally relevant." *Id.* at 92 n.3. For example, litigation may in fact cause an administrative body to convene a meeting, and therefore satisfy the "but for" test; but if the administrative body then adopts a new rule that is not directly related to the litigation, the requirement of proximate (or legal) cause is not met.

Finally, the Court should require the plaintiff to satisfy his burden by "clear and convincing" evidence. "The function of a standard of proof . . . is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" (*Addington v. Texas*, 441 U.S. 418, 423 (1979), *quoting In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). As this Court has repeatedly observed, "we must be mindful that the function of legal process is to minimize the risk of erroneous decisions." *Addington v. Texas*, 441 U.S. at 425; *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958). In this area of crucial importance both to civil rights plaintiffs and to state and local governments, adoption of the "but for" rule, the proximate cause requirement, and the "clear and convincing" evidence standard will help ensure that only those litigants who are truly catalysts are compensated under the Act.

III. IF HELMS IS DETERMINED TO BE A PREVAILING PARTY, HIS ATTORNEY'S FEE AWARD MUST BE NARROWLY LIMITED TO THE MINIMAL SUCCESS THAT HE ACHIEVED

If Helms may properly be considered a "prevailing party" within the meaning of the Fees Act, this Court should make it clear that any award of attorney's fees

must be restricted to those services that contributed directly to his minimal success. *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

This is not a case in which "the plaintiff's claims for relief . . . involve a common core of facts or [are] based on related legal theories" (*Hensley*, 461 U.S. at 435). As detailed in the Statement of the Case (pp. 3-5, *supra*), Helms pursued two distinct claims, factually related only in that they both arose from defendants' actions taken in response to the prison riot on December 3, 1978. Two distinct actions were challenged, however, and they were challenged on distinct legal theories. It is thus not difficult to separate Helms' claims one from the other. This Court has made clear that when the plaintiff presents "distinctly different claims for relief that are based on different facts and legal theories," even if those claims are raised in a single lawsuit against the same defendants, "counsel's work on one claim will be unrelated to his work on another claim." *Hensley*, 461 U.S. at 434-35. The Court concluded that "[t]he congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim." *Id.* at 435 (footnote omitted).

Helms' first claim, in which he contended that his detention in administrative custody violated his due process rights, was ultimately rejected by this Court. 459 U.S. 460 (1983). Helms thus achieved no success on this claim, and is not entitled to any fee for counsel's efforts pertaining to it.

If Helms succeeded at all, it could only have been on his second claim, which related to his conviction of prison misconduct and his sentence to disciplinary custody. This second claim led to the court of appeals' ruling that Helms' constitutional rights had been violated by defend-

ants' reliance on the uncorroborated hearsay testimony of an unidentified informant. That ruling came after the end of Helms' imprisonment, so that injunctive relief was no longer available.[24] After remand, Helms' claim for damages was defeated by reason of defendants' qualified immunity.

Thus, the only "success" achieved by Helms on his second claim was the declaration of his rights on his first appeal to the Third Circuit, and, possibly, being the catalyst for the inclusion in revised Administrative Directive 801 of the provisions relating to the use of confidential sources. Under *Hensley*, only the time reasonably spent on successful claims is compensable. We consider both aspects of Helms' "success" below.

If the Court finds that Helms is a prevailing party because of the court of appeals' declaration of his rights, the award of attorney's fees must be restricted to the time actually spent in obtaining that ruling. Any time spent on his first claim or after the court of appeals' first decision is not compensable. *See Institutionalized Juveniles v. Secretary of Public Welfare*, 758 F.2d 897, 920 (3d Cir. 1985) (district court directed to "disallow entirely all hours spent litigating [the] case after the date on which plaintiffs received their last benefit from defendants").

We note that if the Court accepts Helms' view that he is a prevailing party because he achieved this declaration of his rights, the Court need not address his contention that, in addition, he caused a revision of the Administrative Directive. Assuming, *arguendo*, that Helms could establish that he had some effect on the process of revising the Directive, that effect would be limited to its inclusion of provisions relating to the use of confidential sources. Because he did not seek any administrative re-

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[24] Helms' claim was mooted by the passage of time alone, not, as in *Ross v. Horn*, 598 F.2d 1312 (3d Cir. 1979), because of action taken by defendants in response to his lawsuit.

form, he can claim causative effect on the Directive only because of the court of appeals' declaration that his due process rights were violated by the use of the hearsay evidence against him. Thus, the time spent with the alleged result of triggering the administrative reform corresponds exactly with the time reasonably spent to convince the court of appeals that Helms' conviction violated his procedural rights.[25]

If the Court finds that the mere declaration of Helms' rights is not sufficient to make him a prevailing party, but does not reject, as a matter of law, his contention that he was a catalyst for administrative reform, then *amici* submit that the instructions on remand to the district court should make clear that causation can be derived solely from the court of appeals' declaration of a due process violation. Thus, even if the district court ultimately finds that Helms was a catalyst, the most that he could obtain as attorney's fees would be compensation for the time reasonably spent in obtaining that court of appeals ruling.

It should be noted that *amici* do not attempt to resurrect a wooden rule of proportionality between fees and damages. In *City of Riverside v. Rivera*, 106 S.Ct. 2686 (1986), the Court rejected the view that fees and damages must bear an ideal mathematical relationship to one another. *Riverside* involved plaintiffs who had unquestionably succeeded on the merits and had received substantial damages. This Court upheld an award of attorney's fees, many times larger than the damages, on the basis that the district court's findings in favor of the plaintiffs were not clearly erroneous. *Riverside* does not affect *Hensley*'s holding that an attorney's fee may be awarded only to compensate work reasonably performed to achieve success. In holding that the hours reasonably

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[25] *Cf. Blum v. Stenson*, 104 S.Ct. 1541, 1549 (1984) (" 'results obtained' generally will be subsumed within other factors used to calculate a reasonable fee") (citation omitted).

expended in obtaining substantial success should be fully compensated, even if the resulting fee appears disproportionate to the damages, *Riverside* does not retreat from *Hensley*'s teaching that the Act affords no compensation for services performed in pursuit of severable unsuccessful claims.

In the present case, the district court ruled that no fee award was appropriate because Helms was not a prevailing party, only to be reversed on legal grounds by the court of appeals. *Amici* contend that the district court properly denied any fee award, as Helms simply did not prevail in fact. Should this Court disagree, and conclude that Helms should be rewarded for achieving a modicum of success, the fee award should be restricted, in accordance with *Hensley*, to the effort required to obtain that hollow victory.

Should the case be remanded to the district court, we urge this Court to emphasize clearly the continued vitality of *Hensley*—results matter.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

PETER J. KALIS
KIRKPATRICK & LOCKHART
1500 Oliver Building
Pittsburgh, PA 15222
(412) 355-6562
Of Counsel

BENNA RUTH SOLOMON *
Chief Counsel
JOYCE HOLMES BENJAMIN
STATE AND LOCAL LEGAL CENTER
444 North Capitol St., N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445

* *Counsel of Record for* Amici Curiae

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APPENDIX

The Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. § 1988, provides:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

R.S. § 722; Pub. L. 94-559, § 2, Oct. 19, 1976, 90 Stat. 2641; Pub. L. 96-481, Title II, § 205(c), Oct. 21, 1980, 94 Stat. 2330.